CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

Retraction of Revocation Notice

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: The below-identified Customs broker license was erroneously included in a list of revoked Customs broker licenses.

Name	License	Port Name
Sherri Boynton	10691	Los Angeles

Customs broker license No. 10691 remains valid.

DATED: June 10, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, June 22, 2004 (69 FR 34685)]

CONCLUSION OF PAPERLESS DRAWBACK PROTOTYPE

AGENCY: Customs and Border Protection, Homeland Security.

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) will be concluding its Paperless Drawback Prototype. The prototype, which tests the feasibility of filing paperless drawback claims using the Automated Broker Interface of CBP's Automated Commercial System, was announced in a **Federal Register** document published on September 27, 2002. In that document, CBP announced its intent to run the prototype for approximately one year and evaluate the test program at the end of that period. Based

on its evaluation, CBP has determined that processing of paperless drawback claims cannot be successfully accomplished under current automated systems and the Paperless Drawback Prototype should not be continued for that reason.

DATE: The Paperless Drawback Prototype will conclude on June 28, 2004.

FOR FURTHER INFORMATION CONTACT: Sherri Lee Hoffman, Entry and Drawback Management Branch, Telephone: (202) 927–0300, Email: sherri.hoffman@dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a document published in the **Federal Register** (67 FR 61197) on September 27, 2002, CBP announced its plan to conduct a prototype to test the feasibility of filing paperless drawback claims using the Automated Broker Interface of CBP's Automated Commercial System. The test program was scheduled to run for approximately one year, with a final evaluation to take place at the end of that period.

In a subsequent announcement in the **Federal Register** (68 FR 18994), dated April 17, 2003, CBP reopened the prototype's application period to encourage greater participation in the test program. As a result, commencement of the prototype was delayed until June 18, 2003.

Based on its evaluation of the Paperless Drawback Prototype, CBP has concluded that processing of paperless drawback claims cannot be successfully accomplished under current automated systems. In this regard, it is noted that certain types of drawback claims cannot be processed without the filing of paper documentation (i.e., drawback claims involving NAFTA merchandise, merchandise processing fees, harbor maintenance fees, single entry bonds, etc.). Although CBP notified approved participants in writing that drawback claims requiring paper documentation would not be accepted for purposes of the Paperless Drawback Prototype, many such claims were nonetheless submitted to CBP under the auspices of the test program. In these instances, CBP was able to redirect the submissions as paper drawback claims. It is anticipated, however, that an expansion of the Paperless Drawback Prototype would make this problem difficult to contain and would result in unnecessary delays in the processing of drawback claims.

For this reason, CBP is of the view that the Paperless Drawback Prototype should be discontinued. CBP will conclude the Paperless

Drawback Prototype effective upon the date of publication of this document in the **Federal Register**.

Dated: June 22, 2004

WILLIAM S. HEFFELFINGER, III,
Acting Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, June 28, 2004 (69 FR 36094)]

Final Rule

8 CFR Part 103

19 CFR Part 24

[CBP Dec. 04–19]

RIN 1651–AA59

Overtime compensation and premium pay for Customs officers

AGENCY: Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This rule amends the definition of "customs officer" for the purpose of eligibility for overtime compensation and premium pay. In addition, a conforming change is made to the definition of "immigration officer." These revisions are necessary to reflect recent changes in the functions and organizational structure of U.S. Customs and Border Protection consistent with the Homeland Security Act of 2002.

EFFECTIVE DATE: July 24, 2004.

FOR FURTHER INFORMATION CONTACT: Richard Balaban, Financial Analyst, Office of Field Operations, (202) 927–0031.

SUPPLEMENTARY INFORMATION:

Background

Section 24.16 of the Customs Regulations (19 CFR 24.16) sets forth the procedure that U.S. Customs and Border Protection (CBP) must follow to furnish overtime and premium pay to customs officers, as required by the Customs Officer Pay Reform Act, 19 U.S.C. 267 ("COPRA"). The statutory language at 19 U.S.C. 267(e)(1) provides that overtime compensation and premium pay may be paid to

an individual performing those functions specified by regulation by the Secretary of the Treasury for a customs inspector or canine enforcement officer. Since the enactment of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2135, 6 U.S.C. 101 et seq.), these regulations are now promulgated by the Secretary of Homeland Security.

The enabling regulation, specifically 19 CFR 24.16(b)(7), Customs Regulations, currently defines those eligible for COPRA coverage by specifying only four position descriptions: "Customs Inspector," "Supervisory Customs Inspector," "Canine Enforcement Officer," and "Supervisory Canine Enforcement Officer." This definition does not encompass the expanded border security and inspection functions brought into CBP by the government reorganization consistent with the Homeland Security Act of 2002. (See Homeland Security Act and the President's Reorganization Plan of November 25, 2002, as amended by the President's January 30, 2003 modification.)

When CBP was established on March 1, 2003, it brought together some 18,000 inspection personnel from different agencies and disciplines at the nation's ports of entry, with the priority mission of preventing terrorists and terrorist weapons from entering the United States. At present, three different overtime and premium pay systems are required to administer overtime compensation and premium pay for inspection personnel.

Proposal

On April 7, 2004, CBP published a document in the **Federal Register** (69 FR 18296) proposing to amend the definition of "customs officer" for the purpose of eligibility for overtime compensation and premium pay. If this proposed regulatory change to the definition of "customs officer" in 19 CFR and a conforming change to the definition of "immigration officer" in 8 CFR is adopted, the Department of Homeland Security (DHS) would make COPRA (the current overtime and premium pay system for customs officers) the overtime and premium pay system for the other inspectors working in CBP, in effect creating a single overtime and premium pay system instead of the three different systems that are now in place. This change would eliminate the inequities and disparities in pay and scheduling under the three different systems.

A new position, Customs and Border Protection Officer (CBP Officer), was recently established to merge the expanded border and inspection functions formerly performed within three separate agencies: the former Immigration and Naturalization Service of the Department of Justice, the former United States Customs Service of the Department of the Treasury, and the Animal and Plant Health Inspection Service of the Department of Agriculture. The CBP Officer is the principal front line officer carrying out the priority mission and the traditional customs, immigration and some agriculture

inspection functions which are now the responsibility of CBP. The establishment of the new position enables the agency to perform its mission more efficiently and to provide better protection and service to the public at the ports of entry. In addition, CBP established the CBP Agriculture Specialist position with responsibilities for agriculture inspection of passengers and cargo as well as analysis of agriculture imports. In order to assure that these officers meet their responsibilities to the public, they are required to be available for overtime as a condition of employment.

To enable CBP to furnish overtime compensation and premium pay for these new positions, it proposed to include "Customs and Border Protection Officer" and related positions within the definition of "customs officer" in 19 CFR 24.16(b)(7). It is noted that the continued usage of the term "customs officer" does not reflect any reorganization within DHS. Rather, it occurs because it reflects the pertinent statutory authority, 19 U.S.C. 267, regarding overtime compensation and premium pay. Including the "Customs and Border Protection Officer" within the definition of "customs officer" in 19 CFR 24.16(b)(7) does not affect the authority of a "Customs and Border Protection Officer" to engage in customs, immigration, and agriculture inspection functions. Instead, it is a key step to implementing the "one face at the border" initiative by harmonizing the pay systems for the personnel who perform those functions.

Furthermore, CBP proposed to include a technical change in 8 CFR 103.1 to authorize a customs officer, as defined in 19 CFR 24.16(b)(7), to perform immigration inspection functions, without a separate designation. Currently, customs officers perform such immigration functions pursuant to a designation as an immigration officer.

Finally, it is important to note that CBP's proposed rule was tangentially related but separate and distinct from the proposed rule published on February 20, 2004 in the **Federal Register** by DHS and the Office of Personnel Management regarding the establishment of a new human capital system for DHS. The two proposed rules addressed different human resources issues. The proposed rule regarding COPRA expands the eligibility of certain employees to receive overtime compensation and premium pay under 19 U.S.C. 267; however, it has no impact on setting any employee's basic rate of pay. The human capital rule, on the other hand, proposes to create a new system for setting basic pay within DHS.

Discussion of Comments

CBP solicited written comments on its proposal regarding overtime compensation and premium pay. It received a total of 8 comments in response to the April 7, 2004 notice of proposed rulemaking. What follows is a review of and CBP's response to the issues and

questions that were presented by the comments concerning the proposed regulations.

Five of eight respondents were specifically in favor of the consolidation and offered suggestions and clarifications on the proposal. The remaining three comments, though not negative, offered suggestions for further improvements to the implementation of this change. None of the commenters were opposed to the conversion into COPRA; however, they raised questions regarding the implementation of the conversion. To facilitate the conversion, CBP plans to post further guidance on its internet page (http://www.cbp.gov) upon publication of this final rule.

COMMENT:

Several commenters suggested that Agriculture Technicians should also be covered by COPRA based on the nature of the work that they perform.

CBP RESPONSE:

The "one face at the border" concept addressed the work and pay of the legacy Customs Inspector, the Immigration Inspector and the Agriculture Inspector occupations. Similar to the inspectional occupations, there are three legacy technician occupations. A review of the work performed by these employees is planned. After the review is complete, a determination will be made as to whether overtime changes are necessary. In the interim, Agriculture Technicians will continue to receive overtime compensation as they have in the past.

COMMENT:

Some CBP Agriculture Specialists (formerly Agriculture Inspectors) commented that, while they were generally in favor of being included under COPRA, they did not appreciate that commuting time would be limited to one hour (paid at three times the hourly rate). They felt that, due to the specialized nature of their work, they would be required to incur longer commutes than CBP Officers.

CBP RESPONSE:

The rules for commuting time compensation under COPRA are set forth in 19 CFR 24.16(e)(3). COPRA provides an employee three hours of base pay for an overtime assignment involving a commute regardless of the length of time needed for the commute. CBP believes that this provision is fair and administratively efficient. Furthermore, the majority of commuting instances for CBP Officers and CBP Agriculture Specialists fall within the three-hour timeframe.

COMMENT:

A commenter inquired as to the effective date for the COPRA conversion.

CBP RESPONSE:

The effective date of the regulation will be 30 days after publication of this final rule in the **Federal Register**. Employees will be covered thereafter at the earliest date practicable dependent on administrative contingencies. In the interest of fairness and equity, the change will be implemented for all CBP Officers and CBP Agriculture Specialists at the same time. This implementation is an important step for the agency to move forward in unifying the workforce.

COMMENT:

One commenter was concerned that the COPRA overtime cap would be applied, in mid-year, to the affected employees. Further, concern was expressed about the $25,000 limit on overtime earnings under COPRA which is lower than the $30,000 cap that currently applies to CBP employees.

CBP RESPONSE:

For those converting to COPRA during the current fiscal year, the COPRA overtime cap will only be applicable for the remainder of the fiscal year. Overtime earned by CBP Agriculture Specialists and Immigration Inspectors prior to conversion to COPRA is limited to the CBP $30,000 cap. The $25,000 cap under COPRA is an annual cap but it will only apply to earnings during the period between conversion to COPRA and the end of the fiscal year (approximately three months). Therefore, it is not expected that individual overtime earnings will be impacted.

The $25,000 limit on overtime and premiums under COPRA is established by statute. In prior years, specific appropriations language increased this limit to $30,000. Action is underway to reestablish the COPRA limit at $30,000.

COMMENT:

Two commenters asked about the effect of the annuity provisions of COPRA and whether these provisions could be applied retroactively to past overtime earnings under a different pay system.

CBP RESPONSE:

As originally noted in the Notice of Proposed Rulemaking, COPRA provides up to one half of the statutory cap in calculating retirement pay. However, this provision is applicable only to COPRA earnings. Earnings under other overtime systems would be creditable toward an annuity only if those systems also included such a provision. Consequently, employees moving to COPRA will be unable to "grandfather" in previous overtime earnings toward retirement if their former system did not provide for such credit.

COMMENT:

Two comments expressed concern about Senior Immigration Inspectors (SRI) receiving only COPRA pay in lieu of Administratively Uncontrollable Overtime (AUO). One of these comments spoke specifically to the perceived similarities between the Border Patrol Agent and SRI positions, both of whom currently earn AUO.

CBP RESPONSE:

After a review of the requirements of the SRI position, it was determined that the nature of the work falls within the duties defined for the CBP Officer occupation. (It should be noted that although Border Patrol Agents and SRIs currently receive AUO, the two occupations have different functions and operate in different environments. SRIs work at ports of entry and handle inspections as well as specialized enforcement functions. Border Patrol Agents operate between the ports and focus on interdicting, tracking, deterring, and apprehending illegal immigrants.) The work performed by SRIs will continue in CBP Officers whose position description includes specialized law enforcement responsibilities as well as inspection duties. Just as the CBP Officer occupation will also include officers who specialize in training (CBP Officer, Training), or handling canines (CBP Officer, K–9), the specialized functions currently performed by the SRIs will be performed by a CBP Officer with the requisite specialized skills. Due to the exclusive nature of COPRA (employees covered by COPRA are not eligible for other forms of overtime) and the amount of inspectional work required within the duties of this position, all work beyond the normal work day will be paid through the provisions of COPRA. It should be noted that of the entire inspectional workforce in CBP (over 18,000), approximately 250 are SRIs. Only about half of these SRIs earn AUO, with the others earning other forms of inspectional overtime.

Adoption of Proposal as Final Rule

In view of the foregoing, following careful consideration of the comments received and upon further review of the matter, CBP has concluded that the proposed regulations should be adopted as a final rule.

Executive Order 12866

This rule is considered by DHS to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget (OMB) for review. DHS assessed the impacts of this rulemaking and its alternatives, as presented in the April 7, 2004 notice of proposed rulemaking. CBP did not receive

contradictory information pertaining to the preliminary regulatory impact analysis published with the proposed rule. Accordingly, CBP is restating those findings in final form below.

Impact on User Fees

At present, three user fees, supplemented by appropriations, fund the three different overtime pay systems that, in turn, govern the three traditional inspection disciplines. CBP will assure that there will be no impact on fees or service levels. CBP will track and account by activity how the fees are spent to ensure the proper transfer of immigration and agriculture funds to reimburse the Customs User Fee Account to cover costs incurred for immigration and agriculture overtime services. CBP plans to use the Cost Management Information System (CMIS) to track expenses by activity. CMIS is an activity-based cost accounting system that has been audited and endorsed by the General Accounting Office. Employees use established activity codes to track their time through the Customs Time and Attendance System. Fee payers that are currently providing the traditional user fee funding for customs, immigration and agriculture inspection services will continue to pay and benefit as they have in the past.

Impact on Employees

As noted, when CBP was established on March 1, 2003, it brought together inspection personnel from three different agencies (Agriculture, Immigration and Naturalization Service, and Customs). Inspectors in each of these workforces earn overtime and premium pay based on three different statutes. In order to establish "one face at the border," CBP is creating a new frontline officer corps to unify and integrate the inspectional work of these three legacy agencies. The unified occupations require a single compensation system. Today, while the officers are still classified in the three legacy occupations, they are paid under three sets of overtime rules, which has resulted in disparate earnings for virtually the same work. In addition, the three separate occupations and overtime rules have created significant administrative inefficiencies, as well as work assignment and payroll problems. The impact of this rule on the inspectional workforce is that officers who perform the same functions at the ports of entry will be paid overtime and premium pay under the same computational rules.

This rule does not address the number of overtime hours the officers will be required to work, which varies by individual, by port, and by other factors such as workload fluctuations, staffing levels at a particular location, and changes to the national threat alert level.

Instead, this rule adds currently classified immigration and agriculture officers (approximately 8,000 inspectors) to the COPRA system, and thus affects their rates of overtime and premium pay for actual hours worked. (Over 10,000 inspectors, all former Customs Service, are already covered by COPRA.)

The impact of this rule will be that, for some work schedules, certain employees will earn more, while for other work schedules, they will earn less. For example, current agriculture inspectors who work overtime on a weekday will earn "double time" under COPRA instead of "time-and-a-half" under their current system. On the other hand, these same inspectors may earn less under COPRA than under their current system for work on a Sunday. The chart below provides additional examples of how the three overtime systems differ when comparing hours worked. On the whole, the impact of this rule on the overall earnings for the same or similar number of hours worked is expected to be minimal. While some features of COPRA are less generous than those of other systems, there are compensating features that are more generous. Thus, the differences between COPRA and the other systems balance out in terms of earnings for hours worked. However, it is noted that this rule affects only one aspect of overtime and premium pay earnings of employees. Other factors, such as the total number of hours worked and when the overtime is worked, impact the aggregate earnings of officers on an annual basis. The explanation provided herein, both in text and in the accompanying Table, represent a good faith effort to explain the potential impact of this rule on the employees. However, due to the complexities of the different systems and the differing work schedules of individual inspectors, the exact impact of the proposed rule on a specific employee is speculative and incapable of exact computation. The difficulty of comparing these systems was highlighted in the November 2001 GAO Report titled Customs and INS — Comparison of Officer's Pay (GAO–02–21). The GAO Report compared two of these systems and concluded that "straightforward and generalizable comparisons in relation to these pay provisions are infeasible."

CBP does not anticipate that the amendment will have an impact on private entities because the changes pertain to the agency's internal operating procedures and because overtime compensation will be funded with existing user fees the expenditure of which will be subject to normal accounting within the government. However, DHS has determined this action is a "significant" regulatory action within the meaning of Executive Order 12866 because it may be perceived to relate to the revisions of the Federal employment system DHS is presently considering under the Homeland Security Act. This rule is separate from those revisions, which do not address overtime compensation.

Similarities and differences between COPRA and other overtime systems

There are a number of similarities and differences between COPRA and the overtime systems under which legacy immigration and agriculture inspectors have been covered.

The following chart compares the major provisions of the three systems. The chart contains a high-level overview of the practices established by legacy agencies in their implementation of their overtime systems. It is not intended to contain all the details relevant to determining the rate of pay in specific situations.

TABLE.—GENERAL COMPARISON OF OVERTIME SYSTEMS

Pay provision/ term	Customs Inspectors	Immigration Inspectors	Agriculture Inspectors
Basic pay	General Schedule pay with locality pay adjustment based on geographic area.	Same as Customs.	Same as Customs.
Basic hourly rate	General Schedule hourly rate with locality pay included.	Same as Customs.	Same as Customs.
Basic workweek	7-day	6-day (Monday – Saturday)	6-day (Monday – Saturday)
Basic overtime	Compensation in addition to basic pay for work in excess of the 40-hour regularly scheduled work week or work in excess of 8 hours in a day. Overtime pay is 2 times the basic hourly rate—a 100-percent premium (COPRA).	Compensation in addition to basic pay for work in excess of the 40-hour regularly scheduled workweek. Applies to inspection overtime hours worked between 5:00 p.m. and 8:00 a.m., Monday–Saturday and anytime on Sunday or a holiday. Overtime pay is 4 hours pay for each additional 2 hours or fraction thereof (1931 Act).	Compensation in addition to basic pay for work in excess of the 40-hour regularly scheduled work week or work in excess of 8 hours in a day. Overtime pay is 1.5 times the basic hourly rate not to exceed a GS–10.1 pay for overtime Monday through Saturday (Title 5).

Pay provision/ term	Customs Inspectors	Immigration Inspectors	Agriculture Inspectors
Other overtime	Not applicable.	Compensation in addition to basic pay for (1) overtime inspection work between 8:00 a.m. and 5:00 p.m. Monday–Saturday and (2) non-inspection overtime outside these hours. Overtime is paid at 1.5 times the basic hourly rate (50-percent premium.) Maximum rate is based on salary for GS–10, step 1—(the 1945 Act, FEPA).	Not applicable.
Premium pay	Overall term referring to extra compensation or "premium" paid for work performed on Sunday, holiday, or at night. (The term does not cover overtime pay.)	In addition to Sunday, holiday, and night pay, INS includes overtime in its definition of premium pay.	Overall term referring to extra compensation or "premium" paid for work performed on holiday or at night. (The term does not cover overtime pay.)
Sunday pay	Premium paid in addition to basic hourly rate for Sunday work. Sunday pay is 1.5 times the basic hourly rate (50-percent premium). Sunday can be a regularly scheduled workday. Officers are paid for actual hours worked.	Compensation for Sunday work. Sunday pay is 2-days' pay for 8 or fewer hours worked. Sunday is not a regularly scheduled workday. Sunday work is scheduled in addition to the regular workweek and is always staffed with overtime. Immigration inspectors are paid based on minimum periods of time worked.	Compensation for Sunday work. Sunday pay is 2 times the hourly rate for actual hours worked. Sunday is not a regularly scheduled workday. Sunday work is scheduled in addition to the regular workweek and is always staffed with overtime.

Pay provision/ term	Customs Inspectors	Immigration Inspectors	Agriculture Inspectors
Holiday pay	Premium paid in addition to basic hourly rate for work on a holiday. Holiday pay is 2 times the basic hourly rate (100-percent premium).	Premium paid in addition to basic hourly rate for work on a holiday. Two days' pay for 8 or fewer hours worked (Mon.–Sat.), in addition to basic pay.	Premium paid in addition to basic hourly rate for work on a holiday. Holiday pay is 2 times the basic hourly rate (100-percent premium).
Night pay (night differential)	Premium paid in addition to basic hourly rate for night work. Night differential pay rates differ based on the time or shift hours worked. Officers paid 1.15 or 1.2 times the basic hourly rate (15- or 20-percent differential). "Majority of hours" provision applies depending on actual hours worked.	Premium paid in addition to basic hourly rate for night work. Officers are paid 10-percent premium or "differential" for hours worked between 6 p.m. and 6 a.m.	Same as Immigration.
Night pay on leave	Customs inspectors are paid night differential for work assigned on night shifts when they are on annual, sick, or other leave.	Immigration inspectors are paid limited night differential (if less than 8 hours per pay period) for work assigned to night shifts when they are on leave. INS does not pay night differential to officers on vacation (extended annual leave).	Same as Immigration.
Commute compensation	Compensation for returning to work (commute) to perform an overtime work assignment. Commute compensation is 3 times the basic hourly rate.	Not authorized.	Compensation for returning to work (commute) to perform an overtime work assignment. Commute compensation is based on local rates. It is generally between 1 to 3 times the basic hourly rate.

Pay provision/ term	Customs Inspectors	Immigration Inspectors	Agriculture Inspectors
Callback	Additional overtime paid for reporting early or returning to work for unscheduled inspections. Callback is 2 times the basic hourly rate.	See rollback.	Additional overtime paid for returning to work for unscheduled inspections. Callback is 2 times the basic hourly rate for Sundays but capped at GS–10.1 pay for overtime work between Monday and Saturday.
Rollback	See callback.	Additional overtime paid for reporting early or returning to work for unscheduled inspections. Rollback is 2-hours' additional pay at basic overtime rate.	See callback.
Foreign language proficiency Award	Premium paid for proficiency and use of foreign language while performing inspection duties. Foreign language award is between 3 and 5 percent of basic pay.	Not authorized.	Not authorized.
Retirement annuity (overtime earnings included)	Customs includes overtime earnings (up to ½2 the Statutory Cap) in calculating retirement pay.	Not authorized.	Not authorized.
Alternate work schedule	Regularly scheduled work during a pay period based on a 9- or 10-hour workday totaling 80 hours per pay period (every 2 weeks).	Same as Customs.	Same as Customs.

Increased Efficiency

The adoption of a single overtime system in lieu of the three overtime systems now in place provides greater efficiencies in scheduling, monitoring and tracking overtime. Thus, CBP anticipates no net costs from this regulation, either to the public at large or to user fee payers interested in maintaining levels of services and facilitation. In fact, CBP anticipates savings both to the government and to the

public as the systems for paying officers for overtime and clearing goods and passengers are made more effective and efficient.

Alternatives Considered

A key objective in establishing DHS was to unify border security functions at the nation's ports of entry. In DHS, the three separate agencies whose employees previously worked side by side at these ports of entry are now united. They are unified not only in the same organization, with the same management chain of command — they are also united around a common priority mission. In addition, these employees, with appropriate cross-training, will merge to perform the traditional missions that came together at the ports of entry from the legacy agencies of U.S. Customs, the Immigration and Naturalization Service, and the Animal and Plant Health Inspection Service. Thus, a well-trained and well-integrated workforce serves as a "force multiplier" in carrying out both the priority mission and the traditional missions of CBP. However, in order to integrate the workforce, a common overtime and premium pay system is required.

In order to implement the new frontline positions of CBP Officer and CBP Agriculture Specialist, it is necessary and appropriate to have the incumbents of these positions work under the same overtime system. That is, it is not feasible to pay incumbents of the same position under different overtime systems. Notwithstanding the feasibility, it is also not fair to employees to pay them differently when they are working side by side, performing the same type of work. Thus, the alternative of maintaining three overtime systems was not considered viable under the Secretary's "one face at the border" initiative.

CBP undertook a review of available options for the overtime system and selected COPRA as the best available compensation system for the new positions because of the advantages it offers management, employees, and the traveling public. It is the most modern of the three systems, implemented only 10 years ago; in contrast, the statutes governing the other legacy systems were each enacted over 50 years ago, before the exponential growth of international trade and travel. COPRA more closely aligns pay to actual work performed, enabling the agency to more efficiently manage overtime. It establishes a 7-day workweek under which Sunday is not considered an overtime day, thereby providing greater flexibility in managing work assignments since officers can be regularly scheduled for any day of the week based on operational needs. Further, it is not statutorily permissible to use the overtime systems governing the immigration (1931 Act) and agriculture (Public Law 107–171) inspectors to cover all inspectional activities performed by these new unified officer positions.

CBP considered, but rejected, the option of converting all inspectors to a totally new overtime and premium pay system. In order to

do so, CBP would have needed to seek authorizing legislation. As a result, it is not certain whether, or when, appropriate legislation would have been enacted. This option would have involved unacceptable delays in the implementation of the "one face at the border" initiative.

For the employee, COPRA offers better premium pay rates than the other systems for employees who work night shifts (as outlined in the comparison chart above). Another significant advantage over the other systems is that COPRA provides a retirement benefit. Under the statute, up to 50% of the statutory cap (P.L. 103–66) on overtime earnings is credited as base pay for retirement purposes, yielding a higher annuity that is more aligned with the officer's annual earnings. COPRA also authorizes payment of a foreign language proficiency award (up to 5% of base pay) to officers who maintain and use their language skills as part of their job duties.

Regulatory Flexibility Act

DHS has determined that, as this rule applies only internally to CBP employees, it will not have a significant economic impact on a substantial number of small entities, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Unfunded Mandates

These regulations will not result in the expenditure by State, local, or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

E.O. 13132, Federalism

DHS has determined these regulations will not have Federalism implications because they will apply only to Federal agencies and employees. The regulations will not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

E.O. 12988, Civil Justice Reform

This proposed rule is consistent with the requirements of E.O. 12988. Among other things, the regulation would not preempt, repeal or modify any federal statute; provides clear standards; has no retroactive effects; defines key terms; and is drafted clearly.

Paperwork Reduction Act

The regulations do not involve any information collection from any member of the public.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Immigration, Reporting and recordkeeping requirements.

19 CFR Part 24

Accounting, Customs duties and inspection, Financial and accounting procedures, User fees, Wages.

Amendments to the Regulations

For the reasons stated above, chapter I of Title 8 and chapter I of Title 19 of the Code of Federal Regulations are amended as set forth below.

TITLE 8, CHAPTER I

PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

1. The authority citation for part 103 continues to read as follows:
Authority: 5 U.S.C. 301, 552, 552A; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

* * * * *

2. In § 103.1, paragraph (a) is republished and paragraph (b) is amended by adding a sentence at the end to read as follows:

§ 103.1 Delegations of authority; designation of immigration officers.

(a) Delegations of authority. Delegations of authority to perform functions and exercise authorities under the immigration laws may be made by the Secretary of Homeland Security as provided by § 2.1 of this chapter.
(b) Immigration Officer. * * * Any customs officer, as defined in 19 CFR 24.16, is hereby authorized to exercise the powers and duties of an immigration officer as specified by the Act and this chapter.

TITLE 19, CHAPTER I

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

3. The general authority citation for part 24 is revised and the specific authority citation for § 24.16 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States) 1505, 1520, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 et seq.).

* * * * *

Section § 24.16 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1623; 46 U.S.C. 2111, 2112;

* * * * *

4. In § 24.16, paragraph (b)(7) is revised to read as follows:

§ 24.16 Overtime services; overtime compensation and premium pay for Customs Officers; rate of compensation.

* * * * *

(b) * * *

(7) Customs Officer means only those individuals assigned to position descriptions entitled "Customs Inspector," "Supervisory Customs Inspector," "Canine Enforcement Officer," "Supervisory Canine Enforcement Officer," "Customs and Border Protection Officer," "Supervisory Customs and Border Protection Officer," "Customs and Border Protection Agriculture Specialist," or "Supervisory Customs and Border Protection Agriculture Specialist."

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

TOM RIDGE,
Secretary,
Department of Homeland Security.

[Published in the Federal Register, June 24, 2004 (69 FR 35229)]

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

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Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
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Leo M. Gordon

Decisions of the United States Court of International Trade

Slip Op. 04–69

BEFORE: RICHARD W. GOLDBERG, SENIOR JUDGE

ABEL VALDEZ, Plaintiff, v. UNITED STATES SECRETARY OF THE TREASURY, Defendant.

Court No. 03–00032

[Denial of customs broker's license sustained; defendant's motion for summary judgment granted.]

Dated: June 16, 2004

Law Office of Monica Zapata Notzon (*Monica Z. Notzon*) for plaintiff Abel Valdez.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, *Harry A. Valetk*, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Diane Galiano* and *James N. DeStefano*, Office of Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, Of Counsel, for defendant United States.

OPINION

GOLDBERG, Senior Judge: This matter is before the Court on plaintiff's motion for summary judgment on the pleadings and defendant's motion for summary judgment on the administrative record pursuant to USCIT R. 56.1(a). Plaintiff Abel Valdez challenges the decision of the Deputy Assistant Secretary of the Department of Treasury ("Treasury" or "Secretary") affirming the U.S. Bureau of Customs and Border Protection's ("Customs") denialof his application for a customs broker's license.

For the reasons that follow, the Court finds that Treasury's decision to deny Valdez his customs broker's license was reasonable and supported by substantial evidence. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(g).

I. BACKGROUND

Plaintiff Abel Valdez filed his application for a customs broker's license on February 29, 2000. He passed the written examination in

April 2000. To obtain a license, an applicant must also pass a background investigation. After reviewing Valdez's application and the results of a standard background investigation, the Port Director at Laredo, Texas recommended that a license be issued to Valdez in a memorandum dated May 19, 2001. *See* Administrative Record ("AR"), Doc. 7. Upon request by Customs Headquarters, the Office of Investigations at Laredo re-opened the investigation for Valdez. The basis for re-opening the investigation was information that Valdez's automobile had been seized by the Drug Enforcement Administration in a currency seizure. *See* AR, Doc. 8. Furthermore, Valdez's brother was a fugitive being sought by Customs for conspiracy to smuggle marijuana into the United States. Customs also requested and obtained from Valdez a copy of a Chapter 13 bankruptcy filing that Valdez had disclosed in his application, proof of discharge, and a recent credit report. The credit report, dated July 16, 2001, listed two judgments, a state tax lien, and a dismissed bankruptcy action.

Based on the above information, Customs denied Valdez's application in a letter dated January 8, 2002. *See* AR, Doc. 12. Valdez appealed the denial pursuant to 19 C.F.R. § 111.17. On July 24, 2002, Customs informed Valdez that it was unable to approve his application upon review by the Broker Licensing Review Board. Valdez appealed to Treasury, which upheld the denial on November 21, 2002. Valdez timely appealed Treasury's decision to the Court of International Trade.

II. DISCUSSION

A. Standard of Review

The decision of the Secretary to deny a customs broker's license will be upheld by the Court as a matter of law unless arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See O'Quinn v. United States*, 24 CIT 324, 325, 100 F. Supp. 2d 1136, 1138 (2000). Findings of fact by the Secretary supporting a customs broker's license denial shall be conclusive if supported by substantial evidence. 19 U.S.C. § 1641(e)(3); *see also Bell v. United States*, 17 CIT 1220, 1223–25, 839 F. Supp. 874, 877–79 (1993).

B. Denial of Plaintiff's Application for a Customs Broker's License was Reasonable and Supported by Substantial Evidence

The Secretary has authority over matters involving customs brokers, including issuing licenses under 19 U.S.C. § 1641(b). The Secretary exercised his statutory authority to reject Valdez's appeal and sustain Customs' denial pursuant to 19 C.F.R. §§ 111.16(b)(1) and (3), which provide that an application for a license may be denied for:

> (1) Any cause which would justify suspension or revocation of the license of a broker under the provisions of § 111.53; [or]

(3) A failure to establish the business integrity and good character of the applicant[.]

19 C.F.R. §§ 111.16(b)(1) and (3).

In its denial letter, Customs cited "several instances of financial difficulties, including debts which were incorporated into a Chapter 13 bankruptcy in May 1998, two judgments filed against [Valdez] (one was satisfied), a state tax lien in the amount of $12,599 and large overdue cellular phone bills." *See* AR, Doc. 12. As a result, Customs determined that Valdez had failed to establish his business integrity and good character, as required by 19 C.F.R. § 111.16(b)(3). In addition, Customs concluded that Valdez had violated 19 C.F.R. § 111.16(b)(1) by failing to disclose the two judgments and the tax lien against him. Under § 111.53, referenced in § 111.16(b)(1), a broker's license may be suspended or revoked for "omitt[ing] to state in any application or report any material fact which was required." 19 C.F.R. § 111.53(a).

The Secretary affirmed Customs' decision under § 111.16(b)(3) based on the accumulation of a large amount of debt by Valdez and his failure to meet other financial obligations. *See* AR, Doc. 18. The Secretary determined that the manner in which Valdez handled his personal finances justified Customs' concern that he would continue to demonstrate a lack of financial responsibility in the future.

Valdez argues that the Secretary's decision was erroneous on two distinct grounds. First, Valdez claims that the denial was actually driven by "criminal concerns" — namely, the fact that his brother is a fugitive. Although the record indicates that Customs was concerned with Valdez's relationship with his brother, there is absolutely no mention of it in the Secretary's decision. Accordingly, the Court finds it unnecessary to engage in further inquiry on this issue.

Second, Valdez challenges the Secretary's reference to his debts. Specifically, Valdez argues that the majority of the debts belonged to his ex-wife after being awarded to her in divorce proceedings in 1999. *See* AR, Doc. 15, Ex. B (Agreed Final Divorce Decree). According to Valdez, these debts were not his responsibility and thus the accumulation of a large amount of debt cited in the Secretary's decision was not adequately substantiated. As further evidence of his financial responsibility, Valdez points to a credit report dated January 2003 showing that he has resolved debts belonging to his ex-wife.[1] Upon considering the record made before the Court, the Court finds that the Secretary reasonably concluded that Valdez failed to address the debts accumulated in his name in a sufficiently thorough

[1] Valdez submitted this credit report as part of his complaint. *See* AR, Doc. 20, Ex. E. As defendant correctly notes, it was not properly presented to the Court and thus cannot be considered by the Court. The 2003 credit report is not a part of the administrative record, and Valdez failed to seek leave from the Court before providing this new information as required by 19 U.S.C. § 1641(e)(4). *See Bell*, 17 CIT at 1225, 839 F. Supp. at 879.

and timely manner, thereby demonstrating a lack of financial responsibility. *See Chang v. United States*, 26 CIT ___, ___, Slip Op. 02–126, at 7 (Oct. 24, 2002) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (internal citation omitted). Accordingly, the Court affirms the Secretary's decision that Valdez failed to establish the business integrity and good character required by 19 C.F.R. § 111.16(b)(3).

III. CONCLUSION

For the aforementioned reasons, the Court holds that the Secretary's denial of plaintiff's application for a customs broker's license under 19 C.F.R. § 111.16(b)(3) was reasonable and supported by substantial evidence. Accordingly, the Secretary's decision is sustained.

Defendant's motion for summary judgment on the administrative record is granted. Plaintiff's motion for summary judgment on the pleadings is denied.

Judgment for defendant will be entered accordingly.

Slip Op. 04–70

DUPONT TEIJIN FILMS USA, LP, MITSUBISHI POLYESTER FILM OF AMERICA, LLC, and TORAY PLASTICS (AMERICA), INC., Plaintiffs, v. UNITED STATES, Defendant, and POLYPLEX CORPORATION LIMITED, Defendant-Intervenor.

Consol. Court No. 02–00463

[ITA's antidumping duty second remand determination sustained.]

Dated: June 18, 2004

Wilmer Cutler Pickering Hale and Dorr LLP (*John D. Greenwald*, *Ronald I. Meltzer*, and *Lynn M. Fischer Fox*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Paul D. Kovac*), *Scott D. McBride*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Coudert Brothers LLP (*Kay C. Georgi* and *Mark P. Lunn*) for defendant-intervenor.

OPINION

RESTANI, Chief Judge: This antidumping case is once again before the court following a second remand to the United States Department of Commerce, International Trade Administration ("Commerce," "the Department," or "ITA") to more fully consider its deter-

mination with respect to Defendant-Intervenor Polyplex Corporation Limited ("Polyplex"). Polyplex is an Indian producer of polyethylene terephthalate film, sheet, and strip ("PET film"), which the Department found in its final antidumping duty ("AD") determination to be sold, or likely to be sold, in the United States at less than fair value ("LTFV"). *Dupont Teijin Films USA, LP v. United States*, 273 F. Supp. 2d 1347, 1348 (Ct. Int'l Trade 2003) ("*Dupont Teijin I*"); *see Dupont Teijin Films USA, LP v. United States*, No. 02–00463, Slip Op. 03–157 (Ct. Int'l Trade Dec. 4, 2003) ("*Dupont Teijin II*") (denying Plaintiffs' motion for preliminary injunction after the Department determined to include Polyplex in the AD order upon first remand). The sole issue is whether, in issuing an amended AD determination simultaneously with the CVD order on PET film from India, the Department was required to recalculate Polyplex's dumping margin to account for the countervailing duties that were thus "imposed" under Commerce's new interpretation of the applicable statute, 19 U.S.C. § 1677a(c)(1)(C), and thus, to exclude Polyplex from the AD order. *See Dupont Teijin Films USA, LP v. United States*, 297 F. Supp. 2d 1367, 1374 (Ct. Int'l Trade 2003) ("*Dupont Teijin III*"). Absent such an amendment, Polyplex's dumping margin of 10.34 percent would mandate its inclusion in the antidumping duty order. *See Dupont Teijin I*, 273 F. Supp. 2d at 1353. In its *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce Mar. 3, 2004) [hereinafter *Second Remand Determination*], the Department more fully explained its new policy in determining respondents' U.S. prices in simultaneous AD and CVD investigations, but concluded that it was not authorized to amend its original determination in order to recalculate Polyplex's dumping margin. On appeal, Polyplex claims that such an amendment was required, or at least permitted, under the statute, and that the Department failed to comply with the court's instructions upon second remand. For the reasons that follow, the *Second Remand Determination* is sustained.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court will uphold Commerce's *Second Remand Determination* if it is supported "by substantial evidence on the record" and is otherwise "in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I) (2000).

BACKGROUND

In its final AD determination, the Department determined that Polyplex dumped PET film in the U.S. market at a margin of 10.34 percent, but excluded Polyplex from the AD order on the ground that, after adjusting Polyplex's cash deposit rate to account for the countervailable export subsidies found in a concurrent CVD investigation, "there exists no dumping upon which an affirmative determi-

nation could be based." *Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 Fed. Reg. 34,899, 34,901 (Dep't Commerce May 16, 2002) [hereinafer *Final Determination*]. In *Dupont Teijin I*, the court held that this decision was not in accordance with law and remanded it to Commerce with instructions to "calculate Polyplex's dumping margin after making the adjustments to export price required by 19 U.S.C. § 1677a[1] and Commerce's reasonable interpretations thereof." 273 F. Supp. at 1352. The court went on to instruct that, "[i]f Commerce continues to calculate a dumping margin of 10.34 percent for Polyplex, Polyplex must be subject to the antidumping duty order, whether or not it is given a cash deposit rate of zero because of *expected* offsetting countervailing duties."[2] *Id.* at 1352–53.

In its *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce Aug. 11, 2003) [hereinafter *Remand Determination*], the Department explained that it "now interprets 19 U.S.C. § 1677a(c)(1)(C) as requiring an increase in the respondent's export or constructed export price by the amount of countervailing duties imposed pursuant to a countervailing duty order."[3] *Remand Determ.* at 8. As applied here, Polyplex's exports were not subject to a CVD order at the time Commerce issued the final antidumping determination. *Id.* Therefore, Commerce determined to include Polyplex in the AD order, even though the Department issued a revised final determination along with the AD order on PET film on the same day that it issued the CVD order on the subject merchandise. *Dupont Teijin III*, 297 F. Supp. 2d at 1374.

In *Dupont Teijin III*, the court sustained the Department's *Remand Determination* in part, finding that its interpretation of § 1677a(c)(1)(C) was reasonable and entitled to deference.[4] *Id.* at 1373. Nevertheless, the court found that the Department had failed

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[1] This provision requires the Department to increase the price used to establish a foreign producer's export or constructed export price by "the amount of any countervailing duty imposed on the subject merchandise under Part I of this subtitle to offset an export subsidy." 19 U.S.C. § 1677a(c)(1)(C).

[2] The court noted that:

> The limits of Commerce's discretion in setting cash deposit rates is not at issue here. Plaintiffs do not challenge the zero cash deposit rate. They merely seek to keep Polyplex subject to the discipline of an antidumping duty order, which may require future periodic reviews and ultimately the assessment of duties.

Dupont Teijin I, 273 F. Supp. 2d at 1352 n.10.

[3] In other words, "Commerce considers countervailing duties to be imposed upon the issuance of a countervailing duty order." *Remand Determ.* at 4 cmt. 1.

[4] After reviewing the statutory framework, the court concluded that it was reasonable for Commerce to consider countervailing duties to be "imposed on the subject merchandise under part I of this subtitle" upon the issuance of a countervailing duty order, because part I governs CVD investigations which will culminate in the issuance of a CVD order only upon affirmative determinations of both Commerce and the International Trade Commission ("ITC"). *Dupont Teijin III*, 297 F. Supp. 2d at 1372–73. Further, there is no certainty as to

to adequately address several concerns raised by Polyplex in challenging the Department's application of its new interpretation of "imposed" when calculating Polyplex's dumping margin. The court also found that the Department had failed to fully consider the broader implications of its general application of the new interpretation, which may unfairly skew proceedings in petitioners' favor.[5] *See id.* at 1374. Thus, the court remanded the AD determination on PET film from India to Commerce for a second time with instructions to "explain how it will fairly and consistently apply its interpretation of 'imposed' when a final determination or an amended final determination issues on the same day as a countervailing duty order on the subject merchandise."[6] *Id.* The court also instructed the Department to analyze whether certain procedural extensions that would delay the issuance of a CVD order or align it with the issuance of the AD order, devices available only to the Department and the domestic industry that would effectively prevent countervailing duties from being "imposed" prior to issuance of the AD order, would unfairly allow petitioners to dictate the outcome of concurrent antidumping and countervailing duty investigations when, as here, export subsidies are presumed to cause the respondents' lower-priced sales of subject merchandise in the U.S. market.[7] *Id.* at 1374, 1368 n.1 (explaining

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CVD duties until all opportunities for amendment have expired and the CVD order actually issues.

[5] In *Dupont Teijin III*, Polyplex strongly objected to its inclusion in the AD order. Polyplex argued that countervailing duties were in fact "imposed" upon its entries, even under the Department's new interpretation of § 1677a(c)(1)(C), because the CVD order was issued on the same day as the amended final AD determination and AD order. Thus, Polyplex claimed that Commerce should have made the upwards adjustment to its U.S. price and excluded it from the AD order on PET film from India. 297 F. Supp. 2d at 1373.

Polyplex also disputed the long-term impact of the Department's new interpretation, arguing that, in similar cases where export subsidies contribute to a respondent's lower-priced sales of subject merchandise in the U.S. market, the domestic industry would be able to effectively control whether a particular respondent would be included in an AD order by filing an extension or alignment request in the companion CVD investigation. *Id.* at 1373–74. As the court noted in *Dupont Teijin III*, Commerce may extend a CVD determination on the grounds that it is extraordinarily complicated under 19 U.S.C. § 1671b(c)(1), and petitioners, by filing an alignment request, can ensure that final AD and CVD determinations issue simultaneously under 19 U.S.C. § 1671d(a)(1) and Commerce's regulations. *Id.* at 1374.

[6] The court explained that "[g]iven Commerce's fairly routine procedure of amending final antidumping duty determinations, it is not a sufficient answer to say that the margin calculated in the *Final Determination* was binding." *Id.* at 1374. Thus, the court stated that "Commerce must provide a reasonable explanation for its failure to take the countervailable subsidies into consideration when it re-promulgated all of the dumping margins, including that of Polyplex, in the *Amended Final Determination* and antidumping duty order that issued on the same day as the countervailing duty order." *Id.* n.10.

[7] The court noted that absent the domestic industry's request to align the final countervailing duty determination with the final antidumping duty determination, the countervailing duty order would have issued before the final determination in the antidumping investigation. Thus, absent petitioners' alignment request here, countervailing duties would have been "imposed" on the subject merchandise at the time of the original final

the economic theory behind § 1677a's price adjustment provision). The court noted that Commerce should "seek to restore the parties," to the extent possible, "to the position they would have been had they been able to act on the Department's new interpretation of 'imposed,' and the court's determination in this matter, prior to the issuance of the *Amended Final Determination*." *Id.* at 1374–75.

Commerce issued its *Second Remand Determination* on March 3, 2004. As ordered by the court, the Department first addressed Polyplex's concern that domestic petitioners would be able to dictate the outcome of concurrent AD/CVD investigations by filing an extension or alignment request in the CVD investigation. *Second Remand Determ.* at 5–6; *see supra* n.5 (explaining statutory extension and alignment of CVD proceedings). As a preliminary matter, Commerce explained that it is required by statute to align a CVD investigation with a companion AD investigation if the petitioner makes such a request, as happened here. *Second Remand Determ.* at 5. The Department then noted that "even if the alignment provision were discretionary, the record in this proceeding does not support the conclusion that the petitioners manipulated or controlled the results of the AD determination by requesting alignment of the CVD determination," because the alignment request was filed before either the CVD or the AD preliminary determination issued. *Id.* Further, Commerce pointed out that "Polyplex's manipulation concerns spring from Commerce's interpretation of the term 'imposed' in 19 U.S.C. § 1677a(c)(1)(C), an interpretation that was not known to the petitioners at the time theyfiled their request for alignment." *Id.* As a result, Commerce found the petitioners here did not manipulate Polyplex's AD margin by requesting alignment of the investigations. *Id.* at 5–6. Regarding the extension of proceedings on the ground of extraordinary complication, the Department noted that this is discretionary, so that it can assess such requests on a case-by-case basis. *Id.* at 13.

Commerce next addressed the issue of "how it will fairly and consistently apply its interpretation of 'imposed' when a final determination or an amended final determination issues on the same day as a countervailing duty order on the subject merchandise." *Dupont Teijin III*, 297 F. Supp. 2d at 1374. Commerce explained that its final determinations are based solely on the information on the record at the time of the determination. *Second Remand Determ.* at 6. While Commerce stated that it "likely" will adjust U.S. prices if an AD determination issues on the same day as a CVD order, the Department stressed that "these are not the facts in this proceeding." *Id.* The CVD order here was published after the final AD determination, and "any information received by Commerce after the particular determi-

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determination in the antidumping investigation, and Polyplex would have been excluded from the antidumping duty order. *Id.*

nation at issue is not part of the reviewable record." *Id.* (quoting *Alloy Piping Product, Inc. v. United States*, 201 F. Supp. 2d 1267, 1280 (Ct. Int'l Trade 2002)). As a result, Commerce explained that it should not have, and in fact could not have, considered the post-*Final Determination* CVD order in calculating Polyplex's U.S. price. *See id.*

Although Commerce admitted that there are limited circumstances under which it may amend final AD determinations, such amendments are limited to correcting "unintentional errors that occurred while operating upon record information before it when it issued the determinations."[8] *Id.* Thus, Commerce maintained that, despite its amendment of the *Final Determination* here to correct a ministerial error in the calculation of another respondent's dumping margin, it was not authorized to revise its margin calculation for Polyplex because there were no "errors" to correct. *Id.* at 6–7. The Department noted that this court has held that the ministerial error provisions do "not give the agency authority to upset final decisions where no errors have occurred." *Id.* at 6 (quoting *Badger-Powhatan*, 10 CIT at 245, 633 F. Supp. at 1369). As a result, "if an amended final AD determination is issued on the same day as a CVD order on the same merchandise, Commerce cannot rely upon the ministerial error provision to reflect the duties imposed by a CVD order in its amended final AD determination." *Id.* at 7. Thus, Commerce concluded that, because countervailing duties had not been imposed at the time of the *Final Determination*, it did not err in failing to increase Polyplex's U.S. prices in the AD determination. *Id.*

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[8] By statute, Commerce is required to "establish procedures for the correction of ministerial errors in final determinations." 19 U.S.C. § 1673d(e). Ministerial errors include "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which [Commerce] considers ministerial." *Id.* Commerce's regulations provide that it will "correct any ministerial error by amending the final determination or final results of review." 19 C.F.R. § 351.224(e).

Commerce explained that, while it is aware of two other circumstances under which it will issue an amended final determination, those circumstances do not exist in this case. *Second Remand Determ.* at 7. The first situation is where Commerce must publish an amended final determination following a "Timken Notice," which results from an express granting of relief by the court. *Id.* (citing *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990); 28 U.S.C. § 2643(c) (2000)). The second circumstance arises when the merchandise found by Commerce to be sold at less than fair value differs in some respects from the merchandise found by the ITC to be causing material injury to the domestic industry. *Id.* In such a situation, Commerce is required to modify its calculations in the AD order to reflect the findings of the ITC, because an AD order can only be issued against merchandise that was both found to be dumped and found to be injuring the domestic industry. *Id.* (discussing *Badger-Powhatan v. United States*, 10 CIT 241, 633 F. Supp. 1364 (1986)). Commerce stressed that, with this type of revision to a respondent's AD margin, the record is closed for the purposes of accepting new information, but that Commerce must revise the scope of the AD order, and thus the final AD margin, to correspond with the scope of the ITC's affirmative material injury finding. *Id.* at 7–8. Commerce maintained that neither of these circumstances is present in this case, and the court agrees.

The Department next addressed the court's instructions to restore the parties to the position they would have been had they been aware of the new interpretation of "imposed" before the issuance of the *Amended Final Determination*. Commerce reiterated that it was required to align the CVD investigation with the AD duty investigation under § 1671d(a)(1), and that it was not permitted to amend its final AD determination to adjust Polyplex's export prices under the ministerial error provision. *Id.* at 9. "Thus, it is Commerce's position, given the specific restrictions imposed by the statute, that the parties would be in the same position had they been able to act on Commerce's new interpretation of 'imposed,' and the court's determination in this matter." *Id.* After addressing the parties' comments to the draft second remand results, Commerce concluded that, since countervailing duties are not "imposed" until a CVD order has been issued, Polyplex must be included in the AD order, "given the statutory restraints and the Court's initial ruling on this matter." *Id.* at 19. This action followed.

DISCUSSION

As noted above, in *Dupont Teijin III*, the court upheld Commerce's interpretation of "imposed" in the context of an AD investigation to mean the issuance of a countervailing duty order. *See* 19 U.S.C. § 1677a(c)(1)(C) (requiring Commerce to adjust respondent's U.S. price by "the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy"). On appeal, Polyplex claims that the Department failed to comply with the court's instructions regarding the application of the new interpretation. Polyplex asks the court to reverse and remand this action to the Department once again with instructions to make an upwards adjustment to Polyplex's U.S. price under 19 U.S.C. § 1677a(c)(1)(C), because countervailing duties were imposed on Polyplex's imports on the same date that the Department issued its *Amended Final Determination* and AD order. According to Polyplex, Commerce was required to amend its *Final Determination* and recalculate Polyplex's dumping margin since the AD and CVD orders issued on the same day. Each of these issues are addressed below.

A. Whether the Department Has Failed to Fully Address Polyplex's Concerns that Petitioners Can Manipulate the Results of an AD Investigation By Filing Procedural Extension Requests in the CVD Investigation

Polyplex claims that the Department has failed to adequately address its manipulation concerns. Polyplex asserts that "the Department's interpretation of the statute gives the petitioners an unfair advantage . . . to control the outcome of concurrent CVD/AD investigations." Mem. of Law of Def.-Intervenor Polyplex Corp. Ltd. Opp. Dep't Commerce's Second Redeterm. on Remand ("Polyplex Br.") at

9. Polyplex suggests that, to comply with the court's instructions in *Dupont Teijin III*, the Department needed to explain why it reads the statute in a manner "that converts a[ ] [petitioner's] extension request into a make-or-break margin adjustment" when "there is a viable reasonable alternative reading of the same statute" that requires—or, at a minimum, authorizes—Commerce to make an adjustment to a respondent's U.S. price where, as here, the AD final determination is amended and the AD order issues on or after the date the CVD order is issued. *Id.* at 5–6.

Responding to the Department's explanation in its *Second Remand Determination* that alignment of concurrent CVD and AD investigations is mandatory if petitioners request it under 19 U.S.C. § 1671d(a)(1), Polyplex states that "the fact that an extension must be granted does not mean that the Department is prohibited from making a § 1677a(c)(1)(C) adjustment in co-extended cases."[9] *Id.* at 6. Because the Department has interpreted § 1677a(c)(1)(C) to require a CVD order to be in place prior to the issuance of the AD final determination, Polyplex maintains that "the adjustment to U.S. price for export subsidies is made a nullity in most, if not all, companion AD/CVD investigations. This could not be the intent of Congress in drafting the statute." *Id.* at 8.

The court finds that Commerce did comply with the court's remand order to analyze the risks of petitioner manipulation in simultaneous AD and CVD investigations. As the Department explained in the *Second Remand Determination*, its extension of proceedings based on extraordinary complication is discretionary, so that it can analyze the risks of manipulation in such instances on a case-by-case basis. Alignment of the issuance of the orders in simultaneously-filed AD and CVD investigations, however, is required by 19 U.S.C. § 1671d(a)(1) upon a petitioner's request. Thus, alignment is a statutory right explicitly granted to the domestic industry by Congress. As Commerce pointed out in its determination upon remand, there are legitimate reasons for petitioners to request the alignment of AD and CVD proceedings, such as a desire to simultaneously argue both cases before the ITC.[10]

Nevertheless, the court recognizes that there may be some risk of manipulation given Commerce's interpretation of "imposed" because,

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[9] Polyplex asserts that, because countervailing duties were imposed on the same day that the amended final determination and AD order issued, an adjustment should have been made under *Badger-Powhatan* and *Borlem S.A. - Empreedimentos Industriais v. United States*, 13 CIT 535, 718 F. Supp. 41 (1989), *aff'd*, 913 F.2d 933 (Fed. Cir. 1990). *See infra* Part B (discussing whether an adjustment to Polyplex's export price was required).

[10] Commerce also pointed out that extension/alignment is not the only tool available to a petitioner who seeks to control the timing of AD and CVD orders. Rather than file AD and CVD petitions simultaneously, Petitioners might simply delay the filing of a CVD petition if they are concerned that countervailable subsidies, if accounted for in the AD determination, would exclude a foreign producer from an AD order.

in aligned cases, countervailing duties would never be "imposed" prior to the issuance of a final AD determination. As a result, a respondent like Polyplex would be included in an AD order despite the fact that countervailed subsidies, if accounted for in calculating that respondent's U.S. price, would obliterate the dumping. As the Department explained, however, the risk of manipulation by petitioners is slight given the uncertainty of an investigation's final results, coupled with the *extremely* unusual circumstance presented here, where a foreign producer's countervailed subsidies fully accounted for its less-than-fair-value sales, thereby reducing any AD cash deposits on its imported goods to zero. Thus, this issue will not arise in the overwhelming majority of simultaneous AD/CVD investigations, even if they are aligned. It is, therefore, unlikely that Congress had any such situation in mind in enacting the AD laws, leaving Commerce free to devise a solution to this problem. Further, "even if the petitioners request an alignment, Commerce will continue to follow its established practice of reducing AD cash deposits for countervailing duties that it *determined* to impose to offset export subsidies."[11] *Second Remand Determ.* at 12. The court found in *Dupont Teijin III* that this practice, which prevents the actual assessment of double duties when subsidized and LTFV sales are related, keeps the U.S. in compliance with its WTO obligations, a goal presumably desired by Congress.[12] 297 F. Supp. 2d at 1370 n.5. Thus, the court finds that the Department's determination complied with the court's instructions to address the potential for unfair petitioner manipulation in companion AD/CVD investigations. As shown, the Department has provided a reasonable explanation for why the risk of manipulation should not impact its interpretation of 19 U.S.C. § 1677a(c)(1)(C) in concurrent investigations.

B. Whether the *Second Remand Determination* Explained How the Department Will Fairly and Consistently Apply Its Interpretation of "Imposed" When a Final or Amended Final AD Determination Issues on the Same Day as a CVD Order on the Same Merchandise

As explained *supra*, Commerce's determination upon second remand explained that it likely will adjust respondents' U.S. prices when it simultaneously issues a final AD determination and a CVD order on the same merchandise. The Department explained, how-

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[11] At this point, the zero cash deposit rate is only an estimate of duties. It automatically becomes the assessment rate, however, if no administrative review is requested. *See* 19 C.F.R. § 351.212(c)(1)(i) (2004).

[12] Furthermore, if countervailing duties continue to offset its AD margin, Polyplex may utilize proceedings which eventually will relieve it of AD discipline entirely. There is nothing which prevents inclusion of Polyplex within the regime of the order until it is determined whether AD margins will continue to be fully offset.

ever, that it is only permitted to amend its final determinations to correct for ministerial errors and, accordingly, it is not appropriate to amend a final AD determination to account for a subsequently-issued CVD order in calculating dumping margins. Thus, the Department maintained that it correctly included Polyplex in the AD order on PET film from India. In its appeal, Polyplex argues that Commerce is *required* to amend its final AD determination to adjust Polyplex's U.S. price by the countervailing duties that were subsequently imposed in the CVD order.[13] The court disagrees.

Commerce's inclusion of Polyplex in the AD order is consistent with the statute and the court's rulings in this matter. The court held in *Dupont Teijin I* that Commerce may not exclude Polyplex from the AD order on PET film from India on the basis of a zero cash deposit rate, when its dumping margin is greater than *de minimis*. 273 F. Supp. 2d at 1352. It is undisputed that, if Polyplex's export price is not adjusted for countervailable export subsidies, Polyplex's dumping margin is 10.34 percent. *Id.* at 1350. It is also undisputed that no adjustment can be made to a respondent's export price unless countervailing duties have been "imposed" under 19 U.S.C. § 1677a(c)(1)(C), and that, under Commerce's court-approved interpretation of the statute, countervailing duties are not "imposed" in an AD investigation until a countervailing duty order is issued. *Dupont Teijin III*, 297 F. Supp. 2d at 1373. Finally, it is undisputed that no CVD order had issued against Polyplex at the time that Commerce calculated Polyplex's dumping margin at 10.34 percent and published notice of its final determination in the AD investigation. *Id.* at 1374. Thus, it is clear that the Department's calculation

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[13] Polyplex first quotes 19 U.S.C. § 1673, which authorizes the Department to impose antidumping duties "in an amount equal to the amount by which the normal value exceeds the export price (or constructed export price) for the merchandise." Next, Polyplex, points to § 1673e(a), which requires Commerce to publish an antidumping duty order within seven days of an ITC material injury determination that directs customs officials "to assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise." Polyplex emphasizes that these provisions require that the antidumping duties imposed in the AD order equal the amount by which the normal value of the merchandise exceeds its export price. Export price (or constructed export price), in turn, is governed by 19 U.S.C. § 1677a(c)(1)(C), which requires that the price be increased by "the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy." Polyplex suggests that when these three provisions are read together, they "compel an upward adjustment to export price and constructed export price where, as here[,] countervailing duties have been 'imposed' (as interpreted by the Department) prior to the antidumping duty order." Polyplex Br. at 12.

These provisions, however, do not mandate the result Polyplex suggests. Because countervailing duties are not "imposed" until a CVD order is published, and because the final AD determination on PET film from India was issued before the CVD order, the question here is whether the Department was required to amend its *Final Determination* in order to recalculate Polyplex's dumping margin in light of the subsequently-imposed countervailing duties. For the reasons discussed *infra*, Commerce was not required to issue an amended determination as to Polyplex.

of Polyplex's dumping margin was correct as reported in the final AD determination. The only question, then, is whether the Department was required to amend its *Final Determination* to account for the countervailing duties that were "imposed" on Polyplex's exports on the same day that the antidumping duty order issued. *See id.* (explaining that Commerce simultaneously amended the *Final Determination* to correct a ministerial error in another respondent's dumping margin, issued the antidumping duty order, and issued the countervailing duty order on PET film from India).

The court finds that such an amendment was not required here. It is a basic rule of administrative law that Commerce must base its determinations on information in the administrative record at the time the determination is made. *See, e.g., Neuweg Fertigung v. United States*, 16 CIT 724, 726–27, 797 F. Supp. 1020, 1022 (1992) ("Any information received by [the ITA] after the particular determination at issue is not part of the reviewable administrative record."). Once a final determination is made, the statute only expressly permits the Department to amend it to correct "ministerial errors" in the original final determination. 19 U.S.C. § 1671d(e). Such errors include "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the [Department] considers ministerial." *Id.* It is clear from the language of this provision that it is meant to allow the Department to correct minor, non-substantive errors in its final determinations. It does not authorize the Department to amend a final determination in order to consider a subsequent event, such as the issuance of a CVD order in a parallel proceeding, that would alter the original margin calculation.

These principles were explored in detail in *Badger-Powhatan*. In that case, the court considered whether the Department was required to amend its final AD determination when the products later found by the ITC to be causing material injury were significantly fewer in number than those included in the ITA's dumping margin calculation and AD order. 10 CIT at 243, 633 F. Supp. at 1367. In addressing the issue of whether Commerce was required to amend its final determination to recalculate the dumping margin, the court stated that "[i]t is now well established that amendment, before or after remand, is appropriate when the agency has utilized a legally improper method in making a determination or when the original determination contains an error of inadvertence or mistake." *Id.* at 244, 633 F. Supp. at 1368; *see Borlem*, 13 CIT at 541, 546, 718 F. Supp. at 46, 49 (holding that, despite time limits and finality concerns, ITC has authority to reconsider a final material injury determination upon remand where, due to an amended LTFV determination, "the ITC made its finding of injury based upon material and significant inaccurate facts"); *see also SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("Remand to an agency

is generally appropriate to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations.").[14]

Badger-Powhatan and *Borlem* are readily distinguishable from the present case. In *Badger-Powhatan*, Commerce knew that the ITC had changed the scope of the final determination before it issued its AD order; it just failed to act upon that information. In *Borlem*, ITC acted upon erroneous information. Here, the AD order issued prior to the CVD order, so that no countervailing duties had been "imposed" on Polyplex's merchandise as of the final determination, and ITA was aware of all relevant facts. As a result, the Department's original determination correctly disregarded the countervailable export subsidies when calculating Polyplex's U.S. price. Thus, Commerce did not use a "legally improper method" in arriving at its determination, which would warrant an amendment. Similarly, as Commerce discusses in the *Second Remand Determination*, there was no other "error" in calculating Polyplex's dumping margin that would be remedied by looking to information already in the administrative record. As a result, Commerce determined that it was not permitted to amend its final AD determination under § 1671d(e). Polyplex seeks to impose upon Commerce the duty to amend its final determinations to take into account a dispositive event—the issuance of the CVD order—which occurred outside the administrative record in the AD proceedings. This is impermissible as a purely administrative act under controlling case law. Thus, the Department's *Second Remand Determination* reasonably concluded that it was not permitted to amend the final determination here, and that Polyplex must be included in the AD order.

CONCLUSION

For all of the foregoing reasons, the *Second Remand Determination* is sustained in its entirety. Commerce was not permitted to amend its final determination to account for a subsequently-imposed countervailing duty order on the subject merchandise. As a result, the Department properly determined to include Polyplex in the AD order on PET film from India. While addressing all of the court's concerns upon remand, Commerce correctly concluded that it was unable to exclude Polyplex from the order. Accordingly, the determination of the Department of Commerce upon second remand is sustained.

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[14] *SKF*, however, is distinguishable because the agency is not voluntarily requesting a court-ordered remand to correct an error or to implement changes in policy. *See* 254 F.3d at 1029–30.

Slip Op. 04–71

VALKIA LIMITED, Plaintiff, v. UNITED STATES, Defendant, and CARPENTER TECHNOLOGY CORP.; CRUCIBLE SPECIALTIES METALS DIV. CRUCIBLE METALS CORP.; ELECTROALLOY CORP.; SLATER STEELS CORP., FORT WAYNE SPECIALTY ALLOYS DIVISION; and THE UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, Defendant-Intervenors.

Before: MUSGRAVE, JUDGE
Court No. 02–00249

[Plaintiff exporter argues error in successorship finding at antidumping duty investigation; plaintiff's USCIT Rule 56.2 motion denied, final determination by Commerce Department sustained.]

Decided: June 18, 2004

Cameron & Hornbostel LLP, Washington DC (*Alexander W. Sierck*, *Matthew J. Martin*, *Mark D. Davis* and *Valerie Ellis*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*A. David Lafer*, *Stephen Carl Tosini*); Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*James K. Lockett*), of counsel, for the defendant.

Collier Shannon Scott, PLLC (*Robin H. Gilbert*), Washington, D.C., for the defendant-intervenors.

OPINION

After being selected as a "mandatory" respondent in the investigation of stainless steel bar ("SSB") from the United Kingdom, Crownridge Stainless Steels Limited decided to liquidate. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From the United Kingdom*, 67 Fed. Reg. 3146 (Jan. 23, 2002). *See* Public Record ("PDoc") 162; *see also Antidumping Duty Order: Stainless Steel Bar from the United Kingdom*, 67 Fed. Reg. 10381 (Mar. 7, 2002), PDoc 165. Valkia Limited purchased most of Crownridge's assets from the company's liquidator. During the investigation, the International Trade Administration ("ITA"), United States Department of Commerce ("Commerce" or "the Department") essentially concluded that Crownridge and Valkia had schemed to avoid responding to requests for information, which warranted an adverse inference in selecting from facts otherwise available.[1] Com-

[1] In a proceeding such as this, a determination on the margin must be made. Commerce will therefore use "facts otherwise available" where information necessary for a determination is not on the record. *See* 19 U.S.C. § 1677e(a). If "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" then Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" which may include information from the petition. 19 U.S.C. § 1677e(b).

merce therefore determined to impose antidumping duties of 125.77 percent margin against "Crownridge/Valkia."

Valkia brings this suit contending that an adverse inference is not warranted because neither Crownridge's directors nor its liquidator had the legal authority to respond to Commerce's antidumping questionnaire once the company entered liquidation. Valkia also argues that Commerce's successor-in-interest test is unlawful as applied in this matter. The government and the defendant-intervenors contend that the final determination should be sustained as is. On the reasoning below, the Court sustains the final determination with respect to Valkia.

Background

On December 28, 2000, the petitioners filed an allegation of dumping of stainless steel bar ("SSB") from countries including the United Kingdom,[2] which Commerce began to investigate on January 2, 2001. *Notice of Initiation of Antidumping Duty Investigations: Stainless Steel Bar from France, Germany, Italy, Korea, Taiwan, and the United Kingdom*, 66 Fed. Reg. 7620 (Jan. 24, 2001), PDoc 17. On February 12, 2001, Commerce identified Crownridge as one of the three largest producers or exporters of stainless steel bar ("SSB") from the United Kingdom and therefore made it a mandatory respondent to the investigation. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 66 Fed. Reg. 40192 (Aug. 2, 2001), PDoc 109 ("*Preliminary Determination*"); PDoc 31.

Immediately, on February 13, 2001, counsel for Crownridge informed Commerce that due to "the uncertainties presented by the pending antidumping investigation" and ongoing financial difficulties, the "members" of Crownridge had previously resolved to liquidate the company as of February 6, 2001. *See* Memorandum to File re: Liquidation of Crownridge (Commerce, July 5, 2001), PDoc 91 ("*Liquidation Memo*"), at Att. 2. Nonetheless, on February 20, 2001, Commerce sent Part A of the antidumping duty questionnaire to Crownridge concerning their respective SSB sales in the U.S. and the U.K. over the period October 1, 1999 to September 30, 2000 (the "POI"). PDoc 38. Whether it expected a response to that, on February 26, 2001, Commerce contacted personnel at the U.S. Foreign Commercial Service ("USFCS") in London to ask them for follow-up

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[2] Confidential Record Document 1. When a dumping petition is filed, Commerce is required to determine whether imported merchandise is being or is likely to be sold in the United States at less than its fair value, *i.e.*, the amount by which the price charged for subject merchandise in the home or other comparative market (the "normal value") exceeds the price charged for subject merchandise in the United States (the "U.S. price"). 19 U.S.C. §§ 1673(1), 1677(35).

information on the Crownridge liquidation. Specifically, an ITA financial analyst asked whether

> any of you know whether Crownridge was: 1. Liquidated piecemeal (*i.e.*, its various capitol [*sic*] assets sold by [the accounting firm handling the liquidation] to several different companies? - or - 2. Liquidated wholly to one/few investors who can/are operating Crownridge's facilities as a different legal entity, but basically in the same manner as before the liquidation?

Liquidation Memo at Att. 4 (e-mail of Feb. 26, 2001). USFCS personnel e-mailed back to the ITA analyst that "[t]he official liquidator of Crownridge . . . as a result of my call to him[is] checking to see whether any of the assets of the now-defunct company are still in productive use, either as a continuation of the former enterprise or as a subsidiary of another firm." *Id.* By e-mail of February 28, 2001, the USFCS personnel subsequently reported that:

> [The liquidator] confirms that the Crownridge . . . plant at Milford Haven, Pembroke, Wales is no longer in operation, and that they are now seeking a buyer for the site, plant and machinery. According to [the liquidator], Crownridge was a small independent steel producer, running at a loss when the US anti-dumping investigation was initiated. The company's financial backers took legal advice, and when informed that the cost of defending the company's position in the United States was likely to be in excess of half a million pounds, they withdrew their financial support. Crownridge contends that the U.S. anti-dumping investigation was the event that tipped the company over the edge, and [the liquidator] believes that the inclusion of Crownridge in the anti-dumping petition has proved to be a "red flag" to potential new investors.

Id. at Att. 4.

On March 29, 2001, counsel for Crownridge faxed to Commerce copies of the February 6, 2001 extraordinary resolution passed by Crownridge's members, the February 6, 2001 appointment of the liquidator of Crownridge pursuant to the Insolvency Act 1986 of the United Kingdom, and a copy of a published notice to that effect. *Id.* at Att. 3. On April 3, 2001, the USFCS e-mailed the ITA analyst concerning the then-current status of the Crownridge plant and reiterated: "No valid offers have been received by the liquidator; the plant is completely closed down, and there is no stockpiled product that could be sold or exported." *Liquidation Memo* at Att. 1. The ITA analyst apparently made a further request for updated information, and on April 18, 2001, USFCS personnel reported:

> Further to my 02/28 e-mail, the capital assets of Crownridge are still available for disposal from the liquidator. No serious offers have been received since the company opted to liquidate,

> and none are expected. The liquidator . . . blames the U.S. anti-dumping investigation for this sad situation, informing us that Crownridge's lawyers' assessment of the likely cost of defending the anti-dumping action caused whatever withdrawal of the company's original financial backers, and that the continued action has effectively killed off any prospect of a rescue by other firms. The probable outcome is a write-off of the Crownridge assets, leaving a derelict brownfield site and some scrap machinery. There is no prospect of any change in circumstances, and nothing further that we can do to help you with your inquiries. Please let me know if this information is sufficiently final to close the books on the Crownridge affair.

Id.

On June 15, 2001, a Commerce staff member sent an e-mail to Rhodri Phillips, who had been a member of Crownridge's board of directors prior to its liquidation and (as it turned out) one of two principal investors who had been negotiating with the liquidator to purchase the Crownridge assets from bankruptcy. *See id.* at Att. 5. The e-mail explained the Commerce was in the process of investigating dumping of SSB from the U.K., that Crownridge was named as a mandatory respondent, and that Commerce had sent

> your company a questionnaire (attached), via Federal Express, soliciting certain sales and cost information to be used in our antidumping duty analysis of your company. Your company's response to this questionnaire was due by March 29, 2001. However, to date we have not received any communication from you regarding this matter.
>
> Although we understand from . . . Crownridge's former counsel in this matter that your company is currently undergoing liquidation, we wish to advise you that your *failure to respond* to the Department's questionnaire may result in the *use of facts available* under section 776 of the Tariff Act of 1930, as amended, in making our antidumping determination with respect to your company. Should you decide to respond to the attached questionnaire, you must do so no later than June 25, 2001. Given the statutory time constraints in this proceeding, we may not be able to consider your response in making our preliminary determination currently due on July 26, 2001, but may do so for the purposes of our final determination. . . .

Id. (highlighting added).

Commerce received no response from Crownridge by the time allotted. Accordingly, on August 2, 2001, Commerce published its preliminary affirmative determination on the matter of SSB from the United Kingdom. *Preliminary Determination*, 66 Fed. Reg. 40192. Therein, Commerce assigned to Crownridge the "all others" margin

of 6.85 percent in recognition of the apparent fact that Crownridge "was no longer in business." *Id.* at 40193.

On September 7, 2001, counsel for petitioners informed Commerce that it had received information which contradicted what Commerce had been informed concerning Crownridge's liquidation. PDoc. 127. At Commerce's request, this information was made public in order to afford Crownridge and/or other persons and entities an opportunity to comment upon it. *See* PDoc 134. Specifically, the petitioners alleged that a very short time into Crownridge's formal liquidation its operations had been taken over by one of its major investment creditors. Operating as "Valkia," the "new" company had sold some SSB which had been manufactured by Crownridge. On October 19, 2001, Commerce wrote to Valkia Ltd. via Keith Negal, who had been hired by Crownridge to advise on possible work-out solutions and retained by Valkia post-liquidation, requesting that Valkia respond to the allegation in the petitioners' declaration by November 2, 2001. PDoc 135. At this time, Commerce advised that "*failure to respond* to this letter may result in the Department's use of *adverse* inferences in determining an appropriate dumping margin for Crownridge/Valkia in the Department's final determination. . . ." *Id.* (highlighting added).

Valkia responded, by pre-hearing brief dated November 2, 2001. PDoc 139. Therein, Valkia accepted that most of the allegations appeared to it to be "substantially correct" but argued that none of the points raised by the petitioners should affect Commerce's preliminary determination because neither Crownridge nor any of its directors had the "legal ability" to respond to Commerce's questionnaire under the insolvency law of the United Kingdom. Valkia thus argued that neither it nor Crownridge had "willfully failed" to cooperate with Commerce in this investigation. *See id.*

Nonetheless, following a public hearing, *see* PDoc 154 (Dec. 14, 2001), Commerce did alter its position with respect to Valkia in the final determination. *See Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Stainless Steel Bar from the United Kingdom*, PDoc 156 (Jan. 15, 2002) ("*Decision Memo*"). Commerce's final determination issued on January 12, 2002 drew an adverse inference with respect to "Crownridge/ Valkia" and explained its reasoning as follows:

> The Department's preliminary facts available determination with respect to Crownridge was based on information provided . . . by Crownridge's counsel and the U.S. Embassy in London which indicated that the company did not have the ability to respond to the Department's questionnaire. Based on the additional information that has come to our attention since that time, we have determined that Valkia is the successor-in-interest to Crownridge and that it is more appropriate to apply an adverse inference under section 776(b) of the Act [19 U.S.C. § 1677e(b)] because we believe Crownridge and its successor

company Valkia did not cooperate to the best of their abilities in this proceeding.

* * *

. . . Valkia . . . informed us in its November 2, 2001 case brief responding to the Department's October 19, 2001 letter that: (1) with the financial backing of one of Crownridge's two principal investors, Valkia had agreed to purchase Crownridge's assets in an arm's length bidding process from the company's liquidator in March 2001, the month after the company entered formal liquidation, but did not formally close the transaction to purchase it until June 2001; (2) on February 26, 2001, Valkia traded and purchased on an arm's length basis some finished SSB from a company that had been a secured creditor of Crownridge and that had taken possession of that SSB under its prior lien (or security agreement) once Crownridge went into liquidation; (3) on March 7, 2001, the liquidator agreed to allow Valkia to occupy and use the plant site while negotiations were pending; and (4) Valkia issued its first invoice of production of SSB on March 14, 2001. Despite Valkia's claims that all of these events occurred without guarantee that final purchase negotiations would ultimately be successful, that Valkia never undertook to honor or cover Crownridge's obligations to creditors, and that it had no right to Crownridge's books and records before the acquisition, the fact remains that these representations are inconsistent with those made by Crownridge's liquidator to the U.S. Embassy prior to the Department's preliminary determination. There was no attempt to disclose these facts to the Department after issuance of the Department's questionnaire on February 20, 2001, or even after issuance of a follow-up e-mail from the Department to Rhodri Phillips, a principal of Crownridge who, according to Valkia, was involved in the bidding process for the purchase of Crownridge's assets, on June 15, 2001. This e-mail notified Mr. Phillips that the Department had yet to receive a questionnaire response from Crownridge which was due on March 29, 2001, and granted the company an additional opportunity until June 25, 2001 to respond to it, and advised of the facts available consequence of non-response. . . .

When the Department made its preliminary determination to assign Crownridge a facts available margin, the Department had reason to believe, based on the facts of record at that time, including representations from Crownridge's liquidator, that Crownridge had completely closed down and that there were no prospects for the resumption of operations with respect to the production and sale of SSB by it or some other entity in the future. As later determined, and by Valkia's own admission, as

detailed above, these facts were inaccurate. In addition, neither Crownridge nor Crownridge's liquidator provided any evidence suggesting that Crownridge did not have access to the information. They merely indicated that it would not be relevant, in their view, due to Crownridge's decision not to continue business. However, they failed to disclose accurate facts to the Department about the status of Crownridge or the succession of Valkia to its business, prior to the issuance of the Department's letter in October 2001. Nonetheless under liquidation under UK law[ ], a number of Crownridge's directors and management and other relevant participants remained available, and indeed had returned to work on the site either while still with Crownridge or newly retained by Valkia as early as March 2001. In January 2001, Crownridge was still operating, and officially went [in]to liquidation on February 6, 2001. It was only a matter of weeks, however, before Valkia began operations there as of March 6, 2001.

. . . [T]he Department finds that Valkia is the successor-in-interest to Crownridge. The entire business complex of Crownridge was transferred to Valkia, with operational control held by Valkia in March 2001 and full legal control from June 13, 2001 (prior to the final submission deadline for Crownridge of June 25, 2001). According to information from Crownridge, Valkia, or the petitioners which has not been denied, the following has occurred: Crownridge's production assets were transferred, Valkia purchased and sold Crownridge product to Crownridge customers, Valkia has overlapping ownership and maintained part of the senior management and the plant management and sales director positions of the former Crownridge operation, and has continued Crownridge's commercial activity. Clearly, the U.K. liquidator concluded that his pending sales arrangements with Valkia were of adequate strength to agree on March 7, 2001 to Valkia occupying and using Crownridge's site and machinery with effect from March 6, 2001.[ ] The same liquidator, acting "[f]or and on behalf of Crownridge", provided contradictory information to the Department (via the U.S. Embassy in London), which is one vital part of the Department's findings of failure to cooperate and the appropriateness of taking an adverse inference. These findings and analysis however do not rely on the liquidator alone, who was appointed to wind up Crownridge's business and transfer assets to creditors. [ ] Other members of the Crownridge management and staff clearly remained available through this time, and we note that the directors of Crownridge owed a duty to work pro-actively with the liquidator in bringing maters to a conclusion and could have worked with the Department.[ ] We note also that Mr. Negal had been retained by Crownridge in October 2000 to help

salvage the company, and that he was retained by Valkia to such effect that the liquidator wrote to him on March 7, 2001. According to Valkia and Valkia's counsel (formerly Crownridge's counsel)[ ], Crownridge's books and records remained at the Crownridge office in London, even after its closing. Some kind of response by Crownridge could have been made before June 25, 2001, but the company chose not to.

The fact that Crownridge was under liquidation, given the circumstances in which its business was quickly being transferred to Valkia, does not prevent the Department from concluding that Valkia is the successor-in-interest to Crownridge. If the new company operates as the same business entity as the former company, the Department will accord the new company the same antidumping treatment as the predecessor. *See Final Results of Antidumping Duty Administrative Review: Large Power Transformers From Italy*, 52 FR 46806 (Dec. 10, 1987). As the Court of International Trade concluded in upholding our determination above that the second Italian company was the successor of the first original business in liquidation, "[t]he ultimate question was whether the activities in Italy were 'old' or 'new'. The agency found them to be old. . . ." *Nuove Industrie Elettriche di Legnano S.p.A. v. United States*, 14 C.I.T. 334, 342 (June 1, 1990). Likewise, we find that the old activities of Crownridge are being continued by Valkia. According to information from Crownridge, Valkia, or the petitioners which has not been denied, the following has occurred: Valkia has some of the same principal owners and plant manager and sales director; it has the same production facilities; it has maintained the same supplier relationships; and it has maintained the same customer relationships. In considering these factors, therefore, for purposes of the final determination, we have deemed Valkia the successor in interest to Crownridge, and as such find it appropriate to assign it the margin otherwise applicable to Crownridge, in accordance with our normal practice.

* * *

In this case, we have determined that Crownridge's representations prior to the preliminary determination were misleading and incomplete and that the company failed to cooperate [in accordance with 19 U.S.C. § 1677e(b)] by not acting to the best of its ability to comply with the Department's requests for information. Therefore, an adverse inference is warranted. . . . Moreover, even though Crownridge itself went into liquidation, it is clear that the key personnel and information were present throughout all this time and that the combined commercial activities of Crownridge and Valkia continued with very little gap in commercial activities. Thus, we conclude that these compa-

> nies had the ability to cooperate, but had a reason and strategy not to do so.

Decision Memo at 14–18 (footnotes omitted).

On January 23, 2002, Commerce issued its final determination of sales at less than fair value. 67 Fed. Reg. 3146. On March 7, 2002, Commerce imposed *Antidumping Duty Order: Stainless Steel Bar from The United Kingdom*, 67 Fed. Reg. 10381 (Mar. 7, 2002). This action followed.

Discussion

The Court has jurisdiction over the matter pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c). The standard of review is whether the challenged agency determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). However, substantial evidence supporting the agency's determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132, 899 F. Supp. 632, 635 (1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478, 488 (1951)).

I

Valkia's principle argument is that Crownridge's liquidator and directors were without the legal authority to respond to Commerce's questionnaire as a matter of U.K. law once Crownridge's members resolved to liquidate the company. If so, the fact that the liquidator did not respond to the questionnaire and subsequently made apparent misstatements are irrelevant to the final analysis.

Valkia stresses that a U.K. liquidation is not merely a reorganization. Under U.K. law, at liquidation the board's and members' power over the company ceases, and the appointed liquidator acts as a fiduciary to wind up the company's affairs for the benefit of the company's creditors. He must preserve and swell the company's assets for the company's creditors, and only the liquidator or persons sanctioned by him or the relevant creditor's or members' committee is au-

thorized to deal with the assets, liabilities, bank account, and employees of the company. Pl.'s Br. at 11–12 (citations omitted). Valkia argues that an antidumping questionnaire cannot logically be considered an "asset" to be preserved, and responding to one would have depleted the remaining corporate assets and subjected the liquidator to suit for violating his duties towards creditors under the Insolvency Act 1986. Pl.'s Br. at 13–14, referencing Bailey, Groves & Smith, *Corporate Insolvency*, Ch. 10 ("Liquidators") § 10.32 (Butterworths, London, 2002), and Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 1996), p. 506 (discussing §§ 91(2) and 103 of the Insolvency Act). Furthermore, Valkia argues, any response from Crownridge would have been a futile gesture because the company was being liquidated, rendering a margin determination with only prospective effect meaningless. Thus, Valkia argues that the administrative record does not contain substantial evidence to support an adverse inference since it does not evince "willful" failure to cooperate with Commerce in its investigation, either by the Crownridge directors or by the liquidator.[3]

The government characterizes the issue as whether Commerce's decision to apply an adverse inference was in accordance with law. Def's Br. at 15–16. It contends that Valkia has not offered credible support for its contention that Commerce's interpretation of the relevant provisions of the Insolvency Act 1986 was unlawful and that the matters Valkia referenced rather confirm Commerce's conclusion that Crownridge possessed authority to respond through either the liquidator or its corporate officials. *Id.* Quoting from Commerce's analysis:

> The liquidator, carrying authority and discretion, could have arranged for an answer. Under UK law, the directors have an ongoing duty to remain pro-active with the liquidator in handling the winding up affairs of the company. The liquidator focuses on securing and finalizing asset distribution to creditors and others. *See R v McCredie; R v French* (1999) Times, 5 October (Court of Appeal: Henry LJ and Holland and Hallett JJ) (in Lexis-Nexis, Halsbury's Laws of England and Monthly Review) which held that, on winding up of a company, company officers owed the company a duty to comply with Section 208(1), which

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[3] Valkia also emphasizes that the decision to liquidate was considered as a possible eventuality long prior to the petitioners' filing of the petition and that it was cumulative, not solely the result of the antidumping investigation, although this was the tipping point. It also underscores that Crownridge's legal counsel were discharged when the company went into liquidation, and that it was not until October 19, 2001 that "Crownridge/Valkia" was advised that "failure to respond to this letter may result in the Department's use of *adverse* inferences in determining an appropriate dumping margin for Crownridge/Valkia in the Department's final determination[.]" PDoc 135 (italics added). To which Valkia did, in fact, respond, as requested. *See* PDoc 139. Prior thereto, Commerce questionnaire apparently gave Crownridge the choice of whether or not to respond.

> required co-operation with the liquidator on a pro-active, rather than a reactive, basis in disclosing company property unknown to the liquidator. Further, the commercial responsibilities relating to assets and documents were a continuing, rather than a once for all time, duty and did not depend on a prior request from the liquidator.

Decision Memo, at 17 n.5. *See* Def's Br. at 16.

The petitioners view the matter somewhat differently, emphasizing that the liquidator as Crownridge's representative actually "*did* provide information" – information which proved to be "misleading and false." Def-Int's Br. at 16–17 (footnote omitted, emphasis in original). The petitioners also point out that Valkia repeatedly asserted "as a matter of fact" that Crownridge did not have the ability to respond to the antidumping questionnaire once it entered liquidation. Seeking to hoist Valkia by its own petard, the petitioners argue that Valkia did not provide any factual support for this claim to Commerce and does so only belatedly here. The petitioners argue that the Court should "reject Valkia's late attempt to provide some factual basis for its arguments." *Id.* at 17.

Addressing this latter point first, the Court construes the petitioners' argument as a motion to strike directed at a copy of an e-mail attached to Valkia's brief from the Technical Section of The Insolvency Service, U.K. Department of Trade and Industry. *See* Pl.'s Br. Ex. 9. The copy is an e-mail "enquiry" which asked The Insolvency Service whether "there [is] any authority to support the position that the liquidator is under no obligation to respond to a questionnaire addressed to a company (now in liquidation) from a . . . non-U.K. governmental agency[,]" to which the Technical Section responded,

> broadly speaking, there is nothing contained within the insolvency legislation that requires a liquidator to provide information regarding the company to any parties other than the creditors. However, if requirements are imposed under other legislation, *e.g.*, Employment Protection Regulations, Health & Safety legislation, etc., the liquidator would normally comply with those requirements.

Id.

The submission is within the realm of Valkia's permissible argument. *See Nuove Industrie*, *supra*, 14 CIT at 337–39, 739 F. Supp. at 1570–72. The motion to strike is therefore denied.

Regarding Valkia's substantive points, it would be incorrect to assume that determining the margin of dumping for a company which has ceased to operate is irrelevant. It is true that the margin determined at the initial investigation is prospective in effect, however the margins of all investigated companies are relevant to an "all others" rate which, under current practice, would be determined as a weighted average of individual margins from the investigation. The

margin for a defunct business would also be relevant to a subsequent purchaser of its assets if, as happened here, such a purchaser is determined to be the operation's successor in interest.

Valkia stresses that the potential liability of the liquidator for malfeasance or negligence prohibited him from responding to Commerce, but it also notes that there is "an absence of authority under U.K. insolvency legislation regarding the liquidator's duties to provide information regarding Crownridge to parties other than the creditors." Pl.'s Br. at 13 (citation omitted). Valkia would therefore agree that U.K. law on the subject was a matter of interpretation. *Cf.* Insolvency Act 1986 § 87 (consequences of resolution to wind up; effect on business and status of company) (1) ("[i]n case of a voluntary winding up, the company shall from the commencement of the winding up cease to carry on its business, except so far as may be required for its beneficial winding up), (2) ("[h]owever, the corporate state and corporate powers of the company, notwithstanding anything to the contrary in its articles, continue until the company is dissolved); § 165 (voluntary winding up) ("[t]he liquidator may, without sanction, exercise either of the powers specified in Part II of that Schedule (institution and defence of proceedings; carrying on the business of the company) and any of the general powers specified in Part III of that Schedule); *id.*, Schedule 4, Part II (4) (power to bring or defend any action or other legal proceeding in the name and on behalf of the company), Part II (5) (power to carry on the business of the company so far as may be necessary for its beneficial winding up), Part III (13) (power to do all such other things as may be necessary for winding up the company's affairs and distributing its assets); Pl.'s Br. Ex. 9 ("if requirements are imposed under other legislation, . . . the liquidator would normally comply with those requirements").

An "absence of authority" is not the equivalent of proscribed conduct. Section 87 clearly authorizes the carrying on of such "business" "as may be required" to wind up the company, and Commerce implicitly interpreted the provision as empowering the liquidator to respond to the questionnaire as "required business" *à la* reporting for purposes of Crown or VAT taxes. The Court must defer to the agency's interpretation in the absence of proof that it was unlawful. *See Nuove Industrie, supra*, 14 CIT at 338–39, 739 F. Supp. 1571–72 (analogizing USCIT Rule 44.1 to Fed.R.Civ.P. 44.1 and the analysis of *Baumberger v. Clark*, 390 F.2d 485, 488 (D.C. Cir. 1968). *Cf. Swarts v. Hammer*, 194 U.S. 441, 444, 24 S.Ct. 695, 696 (1904) ("[b]y the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property . . . there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either"). Disregard of Commerce's questionnaire therefore ran the risk of being interpreted as a business decision bearing the risk of noncompliance.

Valkia argues that Crownridge's "non-responsiveness" was not willful in view of the circumstances of liquidation, and the argument is somewhat persuasive when considered in view of the fact that Commerce initially concluded that the liquidator was operating consistent with its statutory duties in not responding to its requests for information. *See Preliminary Determination.*[4] But, to the extent that Valkia's argument invokes an inability to respond because of the lack of resources for responding to Commerce's requests for information, 19 U.S.C. § 1677m(c) requires Commerce to avoid "imposing an unreasonable burden on [an interested] party" and to provide "any assistance that is practicable in supplying such information." Commerce presumably stands at the ready to do so, consistent with its statutory duties, but in the absence of notification of difficulty in responding, it cannot.

Be that as it may, the liquidator was certainly not within his rights or duties in providing the misinformation that wound up, albeit as hearsay, on this administrative record.[5] That circumstance colored Commerce's interpretation and undermined the strength of Valkia's position that Crownridge's non-responsiveness had not been willful. Valkia contends that such misinformation was *ultra vires*, in derogation of the liquidator's responsibilities to Crownridge, and certainly not authorized by Valkia, however the petitioners correctly point out that such misstatements are no less attributable to Crownridge. The liquidator is the company's statutory representative, and the Court cannot conclude on the basis of the record that it

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[4] It may be that "ignorance of the law is no excuse," but to require a bankrupt to obtain the benefit of legal counsel in order to properly respond to an antidumping questionnaire is inequitable. Commerce must therefore accord due sensitivity to the degree of familiarity or expertise of the person appointed to wind up the affairs of the bankrupt with U.S. antidumping procedure. For example, in this instance Commerce's standard instructions to Crownridge enclosed with its standard questionnaire essentially informed that if Crownridge did *not* respond, then the administrative determination *may* be based upon "facts available" (and as distinguished from "adverse facts available). *See, e.g., Liquidation Memo* at Att. 5 (e-mail of June 15, 2001 from Commerce to Rhodri Phillips). To the accounting professional charged with Crownridge's liquidation, it would not necessarily have been unreasonable to conclude that there was a choice in whether to respond: taken at face value, the instruction appears to assert that if Crownridge chose not to participate, Commerce would "do its best" to make a determination based on whatever facts happen to be available at the time, and that it would be a waste of time and remaining company assets to respond, since the company is about to cease to exist (and, after all, an investigation into the margin of dumping for a particular company is grounded upon sound analysis of relevant facts rather than mere conjecture and speculation, is it not?). In other words, Commerce's questionnaire "request" does not necessarily evince interpretation as "incentive" to participate that opposing counsel apparently favors. At any rate, Commerce did accord to Crownridge favorable consideration for non-responsiveness in the preliminary determination.

[5] Valkia argues that the only "misstatement" of record, the e-mail from USFCS personnel, is a "mere scintilla." It may well be the case that the e-mail embodies more the thoughts of the USFC than answers from the liquidator, but the Court concludes that its contents reflect more than a mere scintilla, and there is no basis in the record to doubt its apparent objectivity in summarizing the liquidator's responses to the questions posed.

was erroneous for Commerce to conclude that Crownridge had not acted to the best of its ability in the investigation. Valkia's contention might be more appropriately directed against the liquidator rather than Commerce, but it is only in the context of finding Valkia to be a successor in interest that the matter has significance.

II

In the antidumping context, Commerce is concerned with how a new enterprise can be expected to act in the future. Commerce's traditional position has been that the degree of continuity between the "old" and "new" enterprises, as evident in changes in (1) management, (2) production facilities, (3) supplier relationships, and (4) customer base, answers that question. Valkia challenges this successor-in-interest test as *per se* and therefore arbitrary and capricious, or at least unlawful as applied in this instance, by analogy to the test of succession used in the countervailing duty context, where the concern is whether new ownership of a previously-subsidized company eliminates the financial benefits conferred. The countervailing "same person" test examines continuity of (1) business operations, (2) production, (3) assets and liabilities, and (4) company personnel, however it has recently been determined *per se* in application and therefore an unlawful abdication of Commerce's duty to analyze the substance of the transaction to determine whether the new entity received not only a financial contribution but also a benefit. *See Delverde v. United States*, 202 F.3d 1360 (Fed. Cir. 2000); *Acciai Speciali Terni S.p.A v. United States*, Slip Op. 02–10 (CIT Feb. 1, 2002); *Allegheny Ludlum Corp. v. United States*, 26 CIT ___, 182 F. Supp. 2d 1357 (2002), *opinion after remand*, 26 CIT ___, 246 F. Supp. 2d 1304 (2002), *aff'd*, 367 F.3d 1339 (Fed. Cir. 2004).

As the petitioners point out, Commerce apparently recognizes that the two tests are different considerations for different contexts. *Cf. Final Results of Redetermination Pursuant to Court Remand, Allegheny Ludlum Corp et al. v. United States*, Consol. Court No, 99–09–00566 at 13–14 (Dec. 20, 2000) (currently available at http://ia.ita.doc.gov/remands/99-09-00566.htm) (distinguishing between successor-in-interest and same-person tests). Nonetheless, Valkia argues that whether there are

> any ostensible differences between the tests, they are identical in their effect. Both tests serve to impose a rate that has been calculated for one company against a new company, regardless of whether the new company has been created through an arm's length purchase. . . .
>
> Even if the Court accepts Commerce's extraordinarily broad definition of successor-in-interest test [*sic*], the limited record in this case does not provide adequate factual information for Commerce to make a reasoned determination of successorship

> regarding Valkia. Rather, the so-called facts in support of Commerce's determination are limited to unsupported allegations by the petitioning members of the U.S. industry, statements allegedly made by the liquidator, who was not authorized to speak for Valkia, and the statements in the November prehearing brief submitted to Commerce by Valkia after Valkia had finally been made aware that its own operations were under consideration. But Valkia's statements are mischaracterized. For example, contrary to the [government's] assertion that[ ] "many senior management officials transferred to Valkia,[ ]" the record identifies only one individual from Crownridge – a consultant brought in to salvage the now defunct company's operations – who became a member of the senior management team at Valkia.

Pl.'s Rep. at 6 (footnote omitted). Responding, the government and the petitioners point out that whether there is insufficient information on the record to find successorship, Commerce could conclude that Valkia is Crownridge's successor in interest on the basis of facts otherwise available.

If the result of a "test" inquiry is not predetermined or automatic, then it has not been applied in a *per se* manner. In the countervailing duty context, congressional proscription against *per se* testing is plain from 19 U.S.C. § 1677(5)(F), which instructs that a change in ownership does not necessarily mean that the enterprise is no longer countervailable. The absence of a parallel provision in the antidumping statutes does not diminish the argument against *per se* testing as abdication of Commerce's analytic responsibilities, but "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 2782 (1984).

Ostensibly, in the antidumping context Commerce recognizes that the successorship inquiry is based upon on the totality of the circumstances of each case. *See, e.g.*, *Notice of Initiation of Changed Circumstances Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe and Tube Fittings From Japan*, 67 Fed. Reg. 39676, 39676–77 (June 10, 2002); *Brass Sheet and Strip from Canada: Notice of Final Results of Antidumping Administrative Review*, 57 Fed. Reg. 20460, 20461 (May 13, 1992). In any event, Commerce must clearly articulate consistent reasoning on *why* certain factors weigh for or against finding successorship,[6] the critical

[6] *Cf. Marine Harvest (Chile) S.A. v. United States*, 244 F. Supp. 2d 1364 (2002) (contradictory and therefore unreasonable analysis of post-merger entity in comparison of administrative and changed circumstances proceedings).

inquiry being whether one can reasonably expect that a change in control has eliminated the past unfair trade practice to which the acquired assets had been previously employed, a consideration which is not dependent upon the representations of new management. *See, e.g.*, *Nuove Industrie*, *supra* (successor-in-interest finding based upon a transfer out of liquidation of the "entire business complex" including productive assets, land, contracts, patents, and "all commercial activity;" management's position on successorship dependant upon which would result in lowest margin). Valkia contends that relevant to the question of how it could be expected to act with the assets of Crownridge from liquidation is the fact of record that Crownridge's investors were at odds over the disposition of the Crownridge assets at liquidation, and its representation that their respective negotiations with the liquidator were competitive has not been contested. Valkia points out that only Mr. Negal was identified as senior management, and it is further apparent that he had been hired by Crownridge only for a short time as a work-out *consultant* to try to salvage Crownridge's operations. Although Valkia does not address the fact that the plant management and sales director positions are overlapping, which would presumably tend toward finding continuity in cost and pricing decisionmaking, Valkia emphasizes that it employed neither the former CEO nor the former financial director of Crownridge, thus removing the influence of those individuals over such matters. Further, Valkia argues, the acquisition excluded a small-diameter SSB drawing line and therefore it did not acquire the "entire" complex of Crownridge (although the petitioners point out that the production line remained on-site). Lastly, Valkia complains that Commerce ignored the fact that Crownridge and Valkia used different distributors for the U.S. market, but it argues that the third and fourth factors of the successor-in-interest test are anyway irrelevant because such intangibles are precisely what effect the worth of any acquisition, *e.g.*, most asset purchases from bankruptcy result in continued servicing of the old customer base and reliance upon existing suppliers.

Obviously, the facts of this matter are less "telling" on the issue of successorship than those considered in *Nuove Industrie*. Nonetheless, it is apparent from the *Decision Memo* that Commerce at least considered the facts of record in reaching its determination. While the Court might reach a different conclusion were it to review the administrative record *de novo*, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, *supra*, 383 U.S. at 620. But, Valkia also makes a significant point in stressing that it was an arm's length purchaser of the Crownridge assets and that imputing it with responsibility for Crownridge's non-responsiveness and the liquidator's misstatements is a misapplication of the successorship test. Valkia's position is that

it was not its "brother's keeper" or in a position to insist on (or assist with) Crownridge's compliance with U.S. antidumping law.

The record indeed reflects that all parties, including Valkia, expressed surprise over the discovery of the liquidator's apparent misstatements which wound up on the record. However, as part of its due diligence, a putative purchaser would insist upon full disclosure of all outstanding matters on a contemplated sale of assets that could reasonably affect their use and enjoyment. *Cf., e.g., Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401 (4th Cir. 2002); *Union Pacific Resources Group, Inc. v. Rhone-Poulenc, Inc.*, 247 F.3d 574 (5th Cir. 2001).[7] Commerce does not sit at a negotiation table as some kind of "party," creditor or otherwise, when enforcing U.S. trade law, but the consequence of an antidumping investigation is a kind of contingency which may affect the value of the business being considered. *Cf. Jeanneret v. Vichey*, 693 F.2d 259 (2nd Cir. 1982) (remanding to address effect on value of painting transacted in violation of export restrictions). During negotiations over the disposition of the Crownridge assets, if Valkia had been alert to the possibility of being deemed a successor in interest by Commerce, and assuming a desire to proceed with the acquisition nonetheless, it would have been in Valkia's best interest either to insist that the seller be properly responsive to Commerce or else obtain reliable legal opinion (if not instruction) that Commerce's requests for information could be ignored.

The administrative record here shows nothing of the sort. Of course, Commerce never informed the Crownridge liquidator about the consequences of successorship out of liquidation for purposes of the antidumping investigation. On the other hand, the preliminary information gave Commerce no reason to do so. And yet this entire matter might have been avoided had Commerce simply informed the liquidator or those associated with Crownridge of reasons for continued interest in the disposition of Crownridge's assets.

But, on the other hand, Valkia cannot claim unawareness of the antidumping investigation, being essentially comprised of at least one former Crownridge member and other apparently key individuals involved in the Crownridge operation, and the successor-in-interest test can hardly, by now, be said to be an alien concept in the administration of U.S. antidumping law. While Crownridge may not have had the benefit of counsel with respect to such consideration, there is no indication in the administrative record that Valkia was

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[7] It would also appear to be a universally accepted proposition among nations with respect for property rights that it is incumbent upon the seller to convey good, clean, *unencumbered* title, unless the parties otherwise agree that title may be conveyed bearing contingencies. *See, e.g.*, Uniform Commercial Code § 2–312 (warranty of title); 1980 United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. No. A/CONF. 97/19 (1981), Art. 41 (seller's obligation to deliver free and clear of claims unless otherwise agreed).

likewise situated in its negotiations over the Crownridge assets. If Valkia never considered the potential impact of the antidumping investigation on their acquisition as part of its due diligence prior to consummation, neither the record nor U.K. law evinces a reasonable basis for not doing so.

Conclusion

For the foregoing reasons, Commerce's decision to draw an adverse inference in the selection of facts otherwise available and its conclusion that plaintiff Valkia Limited is the successor in interest of the relevant business of Crownridge Stainless Steels Limited is supported by substantial evidence and is in accordance with law. Judgment will enter accordingly.

Slip Op. 04–72

CRICKET HOSIERY, INC.; THE WILLIAM CARTER CO. and ARTEX INTERNATIONAL, INC. and on behalf of all others similarly situated, Plaintiffs, v. UNITED STATES Defendant, and F.T.B. FARMS, WILLIAM LOVELADY, ROBERT E. MCLENDON FARMS LLC, A-TUMBLING-T RANCHES, CALIFORNIA COTTON GROWERS ASSOCIATION, DELTA COUNCIL, SOUTHERN COTTON GROWERS, INC., and TEXAS COTTON PRODUCERS, INC. Defendant-Intervenors.

Before: MUSGRAVE, JUDGE
Court No. 03–00553

[Plaintiffs brought this action challenging the constitutionality of the fee collected on imports of cotton and cotton products pursuant to the Cotton Research and Promotion Act of 1966, 7 U.S.C. § 2101 *et seq.* Plaintiffs averred that the Court of International Trade had jurisdiction pursuant to 28 U.S.C. § 1581(i). The government moved to dismiss on the ground that 7 U.S.C. § 2111 specifies that challenges to the Cotton Research and Promotion Act are to be brought in the district courts. **Held:** Because this action falls within the exclusive jurisdiction of this Court under 28 U.S.C. § 1581(i), the government's motion is denied.]

Dated: June 18, 2004

The Cullen Law Firm (*Paul D. Cullen, Sr.* and *Joseph A. Black*) and *Greenburg Traurig LLP* (*Teresa M. Polino*), *James A. Moody*, of counsel, for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Aimee Lee*), *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, *Frank Martin*, Office of the General Counsel, United States Department of Agriculture, of counsel, for Defendant.

Wilmer Cutler Pickering Hale and Dorr LLP (*David W. Ogden*, *Randolph D. Moss*, and *Brian M. Boynton*) for Defendant-Intervenors.

OPINION

Plaintiffs bring this action challenging the constitutionality of the imposition and collection of fees on imports of cotton and cotton products pursuant to the Cotton Research and Promotion Act of 1966 ("Cotton Act"), 7 U.S.C. § 2101 *et seq.* The Complaint avers that this Court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1), (2), and (4). The government moves to dismiss for lack of subject matter jurisdiction contending that the Cotton Act specifies the district court in which Plaintiffs have their principal place of business as the proper forum for an action such as this. "[T]he party asserting jurisdiction 'has the burden of proving that jurisdiction in this court is proper.'" *United States v. Shabahang Persian Carpets, Ltd.*, 22 CIT 1028, 1030, 27 F. Supp. 2d 229, 232 (1998) (citation omitted). For the reasons which follow, the government's motion is denied.

Background

The purpose of the Cotton Act is to

> authorize and enable the establishment of an orderly procedure for the development, financing through adequate assessments on all cotton marketed in the United States and on imports of cotton, and carrying out an effective and continuous coordinated program of research and promotion designed to strengthen cotton's competitive position and to maintain and expand domestic and foreign markets and uses for United States cotton.

7 U.S.C. § 2101. The Secretary of Agriculture is authorized under 7 U.S.C. § 2102 to issue orders to effectuate the policy of the Cotton Act and 7 U.S.C. § 2106(a)–(b) provides for the establishment of a Cotton Board comprised of representatives selected by the Secretary from cotton-producing states and cotton importers. The Cotton Board is responsible for "[t]he establishment, issuance, effectuation, and administration of appropriate plans or projects for the advertising and sales promotion of cotton and its products" and "the establishment and carrying on of research and development projects and studies with respect to the production, ginning, processing, distribution, or utilization of cotton and its products." 7 C.F.R. § 1205.333. The expenses incurred by the Cotton Board are to be paid from assessments levied on domestic producers and importers of cotton. 7 U.S.C. § 2106(e)(1); 7 C.F.R. §§ 1205.334(d), 1205.335(a)–(b). For importers there is

> (1) An assessment of $1 per bale of cotton imported or the bale equivalent thereof for cotton products.
>
> (2) A supplemental assessment on each bale of cotton imported, or the bale equivalent thereof for cotton products, which

> shall not exceed one percent of the value of such cotton as determined by the Cotton Board and approved by the Secretary and published in the Cotton Board rules and regulations. The rate of the supplemental assessment on imported cotton shall be the same as that paid on cotton produced in the United States. The rate of the supplemental assessment may be increased or decreased by the Cotton Board with the approval of the Secretary. The Secretary shall prescribe by regulation the value of imported cotton based on an average of current and/or historical cotton prices.

7 C.F.R. § 1205.335(b)(1)–(2). These assessments are collected by the Bureau of Customs and Border Protection. 7 C.F.R. § 1205.335(b).

Plaintiffs in this action are importers of articles made of 100 percent cotton or cotton and man-made fiber blends. They allege that they do not benefit from and object to paying the assessment to support generic advertising of cotton and research related to its production and marketing. Complaint ¶¶4–6. They assert that the mandatory assessment violates their First Amendment rights to free speech (including the right to remain silent) and free association, Complaint ¶1, and contend that this Court has jurisdiction under 28 U.S.C. § 1581(i)(1), (2), and (4)[1] "because this action arises out of a law of the United States providing for 'revenue for imports or tonnage' or 'tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue' and 'administration and enforcement with respect to [such] matters. . . ." Complaint ¶2.

Arguments

The government moves to dismiss this action principally on the ground that 7 U.S.C. § 2111 provides specific procedures for bringing a challenge to the Cotton Act.

> Any person subject to any order may file a written petition with the Secretary, stating that any such order or any provision of

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[1] 28 U.S.C. § 1581(i) provides in pertinent part that:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> . . .
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

> such order or any obligation imposed in connection therewith is not in accordance with law and praying for modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 2111(a). Following the administrative determination "[t]he district courts of the United States in any district in which such person is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction to review such ruling, provided a complaint for that purpose is filed within twenty days from the date of entry of such ruling." 7 U.S.C. § 2111(b).

The government contends that Plaintiffs should not be permitted to circumvent the specific jurisdictional scheme contemplated by Congress. The government notes that § 2111 does not differentiate between imported and domestic cotton and asserts that it would be unfair to require domestic handlers to undergo an administrative proceeding before bringing their action to a district court, but permit importers to bring their case directly to the Court of International Trade. Moreover, the government argues that "an express statutory provision providing for jurisdiction cannot be overlooked." Defendant's Memorandum in Support of its Motion to Dismiss ("Def.'s Br.") at 9. Thus the government concludes that Plaintiffs cannot bypass this provision and bring their claims to this Court under § 1581(i), which the government contends is a more general statute, since § 2111 specifically vests jurisdiction in the district courts and provides an adequate remedy in challenges to the Cotton Act. Def.'s Br. at 10.

Plaintiffs argue that *Orleans International, Inc. v. United States*, 334 F.3d 1375 (Fed. Cir. 2003), and the cases upon which it is based, are controlling precedent which vest this Court with exclusive jurisdiction over the present action. In *Orleans* the Federal Circuit stated:

> "[I]t is faulty analysis to look first to the jurisdiction of the district courts to determine whether the [Court of International Trade] has jurisdiction. . . . The focus must be solely on whether the claim falls within the language and intent of the jurisdiction grant to the [Court of International Trade]." *Vivitar Corp. v. United States*, 761 F.2d 1552, 1559–60 (Fed. Cir. 1985); *see also K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182–83, 108 S. Ct. 950, 99 L. Ed. 2d 151 (1988) ("The District Court would be divested of jurisdiction, however, if this action fell within one of several specific grants of jurisdiction to the Court of International Trade."). The correct approach, then, is to focus on whether the "civil action" at issue falls within the language of

> 28 U.S.C. § 1581(i). If the action does fall within that language, the Court of International Trade has exclusive jurisdiction.

334 F.2d at 1378. Thus Plaintiffs conclude that "the only question should be whether the collection of the cotton fee on imports is described in § 1581(i). Since it is, this Court has jurisdiction." Plaintiff's Opposition to Defendant's Motion to Dismiss at 6.

Discussion

The Court notes, with more than a modicum of disapprobation, the government's usual – and, it must be observed, unrelenting – attack upon the jurisdiction of the Court of International Trade. Although 7 U.S.C. § 2111 provides an aggrieved party an avenue to obtain administrative and judicial review, 28 U.S.C. § 1581(i)(2) places "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" within the *exclusive* jurisdiction of the Court of International Trade. As the Federal Circuit stated in *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir. 1985), and reaffirmed in *Orleans* "it is faulty analysis to look first to the jurisdiction of the district courts to determine whether the [Court of International Trade] has jurisdiction. . . . The focus must be solely on whether the claim falls within the language and intent of the jurisdiction grant to the [Court of International Trade]." 761 F.2d at 1559–60. In the present case, it is undisputed that the Cotton Act assessment constitutes a fee imposed "on the importation of merchandise for reasons other than the raising of revenue."[2] Thus, in the absence of evidence that Congress intended to create an exception to § 1581(i) for challenges to the assessment on cotton imports, this Court has jurisdiction.

The Court is not persuaded by the government's argument that § 2111 is more specific and therefore supercedes § 1581(i). To the contrary, both statutes are specific jurisdictional grants. It is an established maxim of statutory construction that the more recent of two irreconcilably conflicting statutes governs. 2B Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 51.02 (6th ed. 2000). In this instance, 7 U.S.C. § 2111 was enacted as part of the original Cotton Act in 1966, *see* Pub. L. 89–502, § 12, 80 Stat. 284 (1966), but 28 U.S.C. § 1581(i) was enacted as part of the Customs Courts Act of 1980, *see* Pub. L. 96–417, Title II, § 201, 94 Stat. 1728 (1980). Moreover, the Cotton Act did not apply to imported cotton and cotton products until it was amended in 1990, *see* Pub. L. 101–624,

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[2] Although the government does not expressly concede that the Cotton Act assessment falls within the language of 28 U.S.C. § 1581(i)(2), its only opposition to the applicability of this provision is that Congress intended 7 U.S.C. § 2111 to apply instead. Def.'s Br. at 8.

§§ 1991, 1992, 104 Stat. 3909, 3910 (1990). "It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter." 2B Singer, *supra*, § 51.02. Thus Congress was aware of both § 2111 and § 1581(i) when it expanded the Cotton Act to cover imports. Since Congress did not amend § 2111 to give the district courts jurisdiction over actions brought by importers, the Court concludes that Congress did not intend to create an exception to the exclusive jurisdiction it granted to the Court of International Trade.[3]

It is noteworthy that Congress passed the Customs Courts Act of 1980 to remedy the uncertainty which then existed regarding whether actions fell within the jurisdiction of the district courts or the Customs Court and to provide uniformity in decisions effecting international trade.

> Many suits involving international trade issues are and have been instituted in the federal district courts rather than the U.S. Customs Court. . . . Most district courts have refused to entertain such suits, citing the *Constitutional mandate requiring uniformity in decisions relating to imports.* (See U.S. Const. art. I, § 8.) In so doing, the district courts sought to preserve the Congressional grant of exclusive jurisdiction to the United States Customs Court for judicial review of *all matters relating to imports.*
>
> With the growth in international trade, the number of suits in the district courts and subsequent dismissals for want of jurisdiction have increased. Congress is greatly concerned that numerous individuals and firms, who believe they possess real grievances, are expending significant amounts of time and money in a futile effort to obtain judicial review of the merits of their case.
>
> H.R. 7540 corrects these inequities by revising the statutes to clarify the present status, jurisdiction and powers of the Customs Court. The Customs Courts Act of 1980 creates a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court and the United States Court of Customs and Patent Appeals. This comprehensive system will ensure greater efficiency in judicial resources and *uniformity in the judicial decision making process.*

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[3] Because the Court holds that it has exclusive jurisdiction over this action pursuant to 28 U.S.C. § 1581(i), it does not address arguments raised by the parties regarding the adequacy of the remedy provided by 7 U.S.C. § 2111.

H.R. REP. NO. 96–1235, at 19–20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3730–31 (emphasis added). Specifically, § 1581(i) was intended to

> eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This provision makes it clear that *all suits of the type specified are properly commenced only in the Court of International Trade.* The Committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction. The grant of jurisdiction in subsection (i) will ensure that these suits will be heard on their merits.

Id. at 47, *reprinted in* 1980 U.S.C.C.A.N. at 3759 (emphasis added).

Conclusion

The Court has already noted its frustration with the government's – now predictable – assault upon the jurisdiction of the Court of International Trade, and further observes, in conclusion, that advocacy, especially when practiced upon behalf of the sovereign, should be addressed to achieving a fair result, that is, justice. That objective is not furthered by scorch and burn tactics or obstructionist pursuits, characterized succinctly by the Ninth Circuit as "creative arguments." *Cornet Stores v. Morton*, 632 F.2d 96, 98 (9th Cir. 1980); *accord United States v. Universal Fruits and Vegetables*, 362 F.3d 551 (9th Cir. 2004). For the foregoing reasons, the government's motion to dismiss is denied.

Slip Op. 04–73

LINCOLN GENERAL INSURANCE CO., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASS'N, CHRISTOPHER RANCH, L.L.C., FARM GATE, L.L.C., THE GARLIC CO., VALLEY GARLIC, and VESSEY AND CO., Defendant-Intervenors.

Before: MUSGRAVE, JUDGE
Court No. 03–00546

[On challenge by surety to decision of U.S. Department of Commerce to rescind administrative review of a new producer or exporter, defendant's motion to dismiss for lack of subject matter jurisdiction and standing denied.]

Dated: June 18, 2004

Sandler, Travis & Rosenberg, P.A. (*T. Randolph Ferguson*, *Philip S. Gallas*, *Mark R. Ludwikowski*, and *Arthur Purcell*), for the plaintiff.

Peter D. Kessler, Assistant Attorney General; *David M. Cohen*, Director, *Jeanne E. Davidson*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice, (*Stefan Shaibani*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Scott D. McBride*), of counsel, for the defendant.

Collier Shannon Scott (*Michael J. Coursey* and *John M. Herrmann*), for the defendant-intervenors.

OPINION

Lincoln General Insurance Company ("Lincoln") is a surety on bonds for certain importers which entered garlic into the United States from the People's Republic of China ("PRC") subject to *Antidumping Duty Order: Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59209 (Nov. 16, 1994). Invoking the jurisdiction of this Court under 28 U.S.C. § 1581(c) or § 1581(i), Lincoln seeks vacatur and remand of the final decision of the International Trade Administration of the U.S. Department of Commerce ("Commerce") to rescind the first administrative review of Huaiyang Hongda Dehydrated Vegetable Company ("Hongda"). The government challenges subject matter jurisdiction and Lincoln's standing to bring this action. For the reasons herein, the Court finds subject matter jurisdiction under 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. §§ 1581(c) and standing in Lincoln to assert the claims of its affected bonded importers under 28 U.S.C. §§ 2631(c). Consequently, the Court does not reach the jurisdictional issues argued with respect to 28 U.S.C. §§ 1581(i) and 2631(i).

Background

The new shipper review of fresh garlic from the PRC produced or exported by Hongda covered the period November 1, 2001 through April 30, 2002 and was initiated on June 26, 2002. *See Fresh Garlic from the People's Republic of China: Rescission of New Shipper Antidumping Review and Initiation of New Shipper Antidumping Duty Review*, 67 Fed. Reg. 44594 (July 3, 2002). Commerce then announced the opportunity for interested parties to request an administrative review of the antidumping order for the twelve-month period November 1, 2001 to October 31, 2002. *Antidumping or Countervailing Duty Order, Finding or Suspended Investigation: Opportunity to Request Administrative Review*, 67 Fed. Reg. 66612 (Nov. 1, 2002). The U.S. petitioners, defendant-intervenors herein, requested administrative review of Hongda. The initiated administrative review was to cover Hongda's shipments of fresh garlic from the PRC for the period May 1, 2002 through October 31, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative*

Reviews, 67 Fed. Reg. 78772 (Dec. 26, 2002). On April 28, 2003, the petitioners submitted a letter to Commerce withdrawing their request for administrative review of Hongda. Subsequently, on June 19, 2003, Commerce published *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 68 Fed. Reg. 36767 (June 19, 2003), which determined a dumping margin for Hongda for the November 1, 2001 to March 31, 2002 period of 367.76 percent based on adverse facts available.

Lincoln asserts that it "participated" in the administrative review on behalf of itself and/or on behalf of the importers it bonded. On July 24, 2003, Hongda and, on behalf of several importers, Lincoln filed appearances through their respective counsels and thereafter met with ITA officials to urge Commerce to continue the administrative review of Hongda. Hongda and Lincoln informed Commerce that U.S. sureties had uncovered two fraudulent schemes that had been used to evade antidumping duties on imports of Chinese agricultural products and that these schemes particularly implicated Hongda's customs and potential antidumping duty liabilities. Hongda and Lincoln indicated that a continuation of Hongda's administrative review afforded Commerce the opportunity to identify legitimate and illegitimate garlic shipments, develop solutions for curtailing the fraudulent abuse of its antidumping reviews with respect to China, and resurrect public confidence in the proper administration of Chinese agricultural imports.

On July 29, 2003, Hongda and, on behalf of several importers, Lincoln submitted comments in opposition to Commerce's potential rescission of the first administrative review of Hongda. Hongda and Lincoln reiterated to Commerce that Hongda was the victim of identity theft and concomitant fraudulent schemes during the period of its administrative review. Accordingly, Hongda and Lincoln requested that Commerce continue Hongda's review to uncover additional information about the fraudulent schemes which were used to avoid payment of antidumping duties and to determine which imports under Hongda's name were legitimate.

On August 6, 2003, Commerce published notice in the Federal Register rescinding Hongda's administrative review. *See Fresh Garlic From the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review*, 68 Fed. Reg. 46580 (Aug. 6, 2003). Commerce considered that fraudulent import practices are rather the concern of the Bureau of Immigration and Customs Enforcement (*i.e.*, irrelevant to administrative review of the antidumping duty order), and reasoned that rescission was appropriate because the petitioners had withdrawn their request and Hongda itself had not made one. The next day, August 7, 2003, Commerce published a notice in the Federal Register extending until October 31, 2003 the deadline for its preliminary results in the administrative review in which Hongda was a respondent prior to Commerce's deci-

sion a day earlier. *See Fresh Garlic From the People's Republic of China: Notice of Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews*, 68 Fed. Reg. 47020 (Aug. 7, 2003).

After filing this action, Lincoln moved for a preliminary injunction to enjoin the Bureau of Customs and Border Protection from liquidating any unliquidated entries for which Hongda was listed as the manufacturer or exporter, and the government filed its motion to dismiss for lack of subject matter jurisdiction. Argument on the motions was heard December 16, 2003, at which it was adduced that a preliminary injunction had been granted in the matter of *Huaiyang Hongda Dehydrated Vegetable Company v. United States*, Court No. 03–00636, which afforded sufficient preservation of Lincoln's claims for the time being. The government's motion was taken under advisement.

The parties were subsequently ordered to show cause why the matter should not be stayed pending the outcome of Court No. 03–00636. Their responses indicate a preference for immediate resolution of the jurisdictional issue. The government's response opposes a stay on the argument that it would be tantamount to an assertion of jurisdiction, and it also moves to strike a certain attachment[1] to Lincoln's brief in response to the order to show cause as irrelevant. Lincoln suggests that the proper posture would be for expedited resolution of the jurisdictional issue and then consolidation with Court No. 03–00636, and it also contends the attachment to its response brief is "directly relevant to the instant case." Pl.'s Resp. to Order to Show Cause, n.1.

Discussion

Although the letter from Commerce attached to Lincoln's response to the order to show cause relates to the subsequent administrative review, the Court considers the attachment within the realm of Lincoln's permissible argument and indicative of Commerce's position

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[1] The attachment is a letter from Commerce to counsel for Lincoln rejecting counsel's November 26, 2003 request to Commerce "on behalf of" Lincoln and Aegis Security Insurance Company for administrative review of the twelve-month period November 1, 2002 to October 31, 2003 on the ground that Lincoln and Aegis are surety companies which "do not meet the requirements" of 19 U.S.C. § 1677(9) interested parties. On the other hand,

> The Act provides that importers are interested parties, and you have indicated that Lincoln and Aegis are sureties for the importers Y&L Enterprises, Inc. and Ming Fa Group. If either of these importers had requested an administrative review by the deadline of November 30, 2003, the Department would have considered these requests. However, your letters expressly state that Lincoln and Aegis are requesting the reviews, not their importer customers. Thus, we will not initiate an administrative review based upon your requests.

Pl.'s Resp. to Order to Show Cause, Ex. A.

with respect to the issues presented here. The government's motion to strike is therefore denied.

The overarching question implicated by the government's motion to dismiss is whether a surety on a customs entry bond has access to the same administrative and judicial remedies available to its principal on the bond, a United States importer. The burden of establishing jurisdiction lies with Lincoln as the party seeking to invoke this Court's jurisdiction. *See, e.g.*, *Old Republic Ins. Co. v. United States*, 14 CIT 377, 379, 741 F. Supp. 1570, 1573 (1990) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 785 (1936)).[2]

Since the United States is immune from suit unless it consents to be sued, *e.g.*, *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351 (1980), waiver of sovereign immunity "must be unequivocally expressed" in the jurisdictional statute, and it is to be "strictly construed . . . in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 2096 (1996). For purposes of the imposition and administration of countervailing and antidumping duties under subtitle IV of the Tariff Act of 1930, as amended, the United States' explicit waiver of sovereign immunity is contained in 28 U.S.C. § 1581 (2002).

28 U.S.C. § 1581(c) provides: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." Section 516A, codified at 19 U.S.C. § 1516a, encompasses the type of determination about which Lincoln complains. *See* 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I), 1516a(a)(2)(a)(2)(B). In order to bring an action to contest such matters before this Court, a plaintiff must demonstrate that it is both an "interested party" and "a party to the proceeding in connection with which the matter arose." 28 U.S.C. § 2631(c). *See* 19 U.S.C. § 1516a(d) ("Any interested party who was a party to the proceeding under . . . subtitle IV of this chapter shall have the right to appear and be heard as a party in interest before the United States Court of International Trade."). Conversely, only an "interested party" may participate before Commerce in the antidumping and countervailing proceedings encompassed by section 516A of the Tariff Act of 1930. *See JCM, Ltd. v. United States*, 210 F.3d 1357, 1360 (Fed. Cir. 2000).

"Interested party" is defined by statute to include *inter alia* "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a

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[2] Irrespective of the parties' representations, however, a court must also always determine whether its jurisdiction is proper. *See, e.g.*, *USEC Inc. v. United States*, 27 CIT ____, ____, 259 F. Supp. 2d 1310, 1329–1330 (2003); *Elkam Metals Co. v. United States*, 23 CIT 170, 175, 44 F. Supp. 2d 288, 292 (1999); *Brecoflex Co. v. United States*, 23 CIT 84, 86, 44 F. Supp. 2d 225, 228 (1999); *Zenith Radio Corp. v. United States*, 5 CIT 155, 156 (1983) (agency's decision with respect to participation in administrative proceeding irrelevant to question of standing).

majority of the members of which are producers, exporters, or importers of such merchandise[.]" 19 U.S.C. § 1677(9)(A). Commerce's regulations define "importer" as "the person by whom, or for whose account, subject merchandise is imported[.]" They define "person," in turn (and circularly in part), as including "any interested party as well as any other individual, enterprise, or entity, as appropriate." 19 C.F.R. § 351.102.

Lincoln asserts that it is both an interested party and a party to the contested proceeding, and that jurisdiction here is appropriate under 28 U.S.C. § 1581(c). Jurisdiction under 1581(c) is proper, Lincoln asserts, because the surety's ability to "stand in the shoes" of its importer-principal is a well-recognized principle in customs law. *See, e.g., Fidelity and Casualty Co. of New York v. United States*, 28 Cust. Ct. 103, 107, C.D. 1394 (1952) (the surety "is subrogated to such rights and remedies, as the principal has in connection with the debt, which will afford him a means of reimbursement") (quoting 60 *Corpus Juris* at 771). *Cf. St. Paul Fire and Marine Ins. Co. v. United States*, 2 CIT 104, 525 F. Supp. 880 (1981) (surety's ability to "stand in shoes" of importer is a general creditor's claim against bankrupt's estate). In *Fidelity*, a surety on a single consumption entry bond was held to be a proper party to file a petition for remission of additional duties under 19 U.S.C. § 1489. The court found that a surety has all the rights and remedies that are available to the principal on an import bond, and the failure of Congress to identify the surety specifically in the underlying statute as a party entitled to protest or petition the assessment of additional duties or liquidated damages was not an impediment to the surety's right to seek administrative and judicial relief granted to the principal/importer under the statute and its attendant regulations. Nor did the court find payment of the debt by the surety to be a pre-requisite to standing for the surety to avail itself of the administrative and judicial remedies available to the principal on the bond; indeed, the case note states that the right of the surety to avail itself of remedies available to the principal is "especially true" where the surety is shown to have paid the amounts which included the additional duties in controversy. 28 Cust. Ct. at 103. By contrast, Lincoln notes, no "interested party" is required to tender duties as a condition of challenging the ITA's findings under § 1581(c). Lincoln thus argues that when a surety stands in the shoes of the importer, it may assert the claims of the importer as an "interested party" within the meaning of § 1677(9), and thus has the right to participate and comment in antidumping and countervailing duty proceedings before Commerce. Further, Lincoln asserts, it was a "party to the proceeding" consistent with 28 U.S.C. § 2631(c) because it filed comments to Commerce "on behalf of" importers seeking to draw Commerce's attention to the fraudulent schemes that were causing injury to the liability of the importers (and itself).

The government acknowledges that Lincoln apprized Commerce of "two fraudulent import schemes used to avoid antidumping (AD) duties[,]"[3] but takes the position that since a surety is not specifically mentioned in § 1677(9) as an "interested party" Lincoln therefore could not participate as one in the antidumping proceeding and therefore does not have standing to bring suit here. *Cf.* 19 U.S.C. §§ 1516a(a), 1516a(d), 1516a(f)(3), 1677(9)(A). The government argues that the instant matter is analogous to the numerous cases denying interested-party status to entities seeking redress or protection of domestic or tangential interests. *See, e.g., Bhullar v. United States*, 27 CIT ___, ___, 259 F. Supp. 2d 1332, 1339–43 (2003) (section 1677(9) does not list "shareholder" as "interested party"); *Save Domestic Oil, Inc. v. United States*, 26 CIT ___, ___, 240 F. Supp. 2d 1342, 1345 (2002) (association's majority not regional crude oil producers, therefore not an "interested party"); *Brother Industries (USA), Inc. v. United States*, 16 CIT 789, 793–94, 801 F. Supp. 751, 757 (1992) (legislative history of "interested party" contrasts industries suffering adverse affects with those having no stake and, *ergo*, no injury); *NTN Bearing Corp of America v. United States*, 15 CIT 75, 78, 757 F. Supp. 1425, 1428 (1991) (reiterating *Gilmore*); *Gilmore Steel Corp. v. United States*, 7 CIT 219, 226, 585 F. Supp. 670, 676 (1984) (to be "interested party" petitioner must be member of affected industry and petition must be backed by majority of that industry); *Matsushita Electric Industrial Co. v. United States*, 2 CIT 254, 256–57, 529 F. Supp. 664, 667–68 (1981) (importers' committee and manufacturers of Japanese televisions lacked standing to participate in ITC proceeding). Thus, the government argues, "only entities that are involved in the production, importation or sale of merchandise in an industry adversely affected by dumping" are interested parties. Since "a surety is not involved in the production or sale of merchandise[,]" it therefore has "no stake in the result" of the administrative proceeding, according to the government. Def's Br. at 12–13 (quoting S.REP. No. 96–249, 96th Cong., 1st Sess. 63 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 449). Since Lincoln was not an "interested party," according to the government, it could not have been a "party to the proceeding"[4] as required by 28 U.S.C. § 2631(c). *See JCM, supra*, 210 F.3d 1357 at 1360. And on the related issue, the government characterizes Lincoln's only attempt to "actively participate" in the administrative proceeding as an "eleventh hour" submission which Commerce correctly deemed "inadequate" to render Lincoln a "party to the proceeding." Def's Br. at 16–17. Acceptance of a submission does not equate to active partici-

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[3] Def's Br. at 6, quoting Pl.'s Comments at 3.

[4] Commerce's regulations define "party to the proceeding" as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102.

pation, the government argues, because Commerce commonly accepts information and comments from sources which are not interested parties, and Lincoln did not itself claim to be an "interested party" in its comments to Commerce. *Id.* at 16–17. But, the government acknowledges that the submission was "on behalf of" a group of importers.

In resolving the jurisdictional issues raised, it is instructive to recall that the Trade Agreements Act of 1979 sought to enhance sureties' rights by affording them the ability to file protests independent of their bond principals to the U.S. Customs Service, now the Bureau of Customs and Border Protection, and by extending the period within which such a protest may be filed. *See* 19 U.S.C. § 1514(c)(2)(A); 28 U.S.C. § 2631(a); P.L. 96–39 § 1001(b)(3), 93 Stat. 144, 305 (1979); S.REP. No. 249 at 254, *reprinted in* 1979 U.S.C.C.A.N. at 640; *Old Republic Ins. Co. v. United States*, 10 CIT 1, 625 F. Supp. 983 (1986). *See also United States v. Ataka America, Inc.*, 17 CIT 598, 607 n.12, 826 F. Supp. 495, 501 n.12 (1993). Yet, as surety bearing liability on the affected importers' bonds, Lincoln's "stake" in the outcome of Commerce's proceedings cannot be said to be any less than those of petitioners asserting claims "on behalf of" an affected industry, in which context "the legislative history calls for a liberal construction of the standing requirements." *Brother Industries (USA), supra*, 16 CIT at 794, 801 F. Supp. at 757 (referencing *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1203, 704 F. Supp. 1075, 1084 (1988)). *See id.* ("The language in the legislative history is broad and unqualified. It contrasts industries suffering *adverse effect* with those having *no stake*: the former have standing; the latter do not.") (emphasis in original). "Strictly" construed,[5] such construction applies to *all* "interested parties," of course.

All of the parties alleging "interested party" status in the government's referenced cases appear to have had only tangential interests in the underlying subject matter.[6] Here, the government does not dispute that each of the importers bonded to Lincoln would be an

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[5] *See Lane v. Pena, supra*, 518 U.S. at 192, 116 S.Ct. at 2096.

[6] *Matsushita*, for example, appears to be the nearest case supporting the government's position; however, it is distinguishable because the "importers" in question were the Imports Committee, Tube Division, of the Electronic Industries Association, which presented itself in the motion to intervene "as an association of manufacturers in the United States television industry." The Court's rationale for denying intervention as of right to that committee was based on the fact that of the five companies represented by that Committee, only one had ever "manufactured" television sets but had sold its production facility prior to the administrative determination that was the subject of the case. "Even if [the one] were to be considered a manufacturer of television set, the Imports Committee still does not have a majority of members who manufacture a like product." 2 CIT at 257, 529 F. Supp. at 668. In other words, pursuant to that committee's representation with respect to its own posture in the matter, the committee fell short of being "a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States." *See* 19 U.S.C. § 1677(9) (italics added). *Cf. Zenith Radio, supra*, 5 CIT 155.

"interested party" under § 1677(9) with a stake in the administrative proceeding and the right to participate in the administrative proceedings and bring this judicial challenge, and it has not offered a plausible reason for distinguishing the surety's well-recognized rights of subrogation as applicable to claims only before Customs and not Commerce. Lincoln's status as surety with joint and several liability under the importers' bonds confers upon it the legal and contractual right to assert the same claims and defenses as those principals. *See* Arthur A. Stearns, THE LAW OF SURETYSHIP § 7.1 (James L. Elder, ed., 5th ed. 1951). *Cf.* 19 U.S.C. § 1514(c)(2)(A). Plainly, the surety's right to "stand in the shoes" of its importer-principal applies equally to all matters of international trade, including the administration of antidumping and countervailing duty measures, where the sure impact on its contractual bond liability for import duties bestows the surety with "such rights and remedies[ ] as the principal has in connection with the debt[.]" *Cf. Fidelity*, *supra*; 73 Am. Jur. 2d, Subrogation §§ 1, 23 ("where special circumstances exist equity will allow subrogation where a liability only, and not a payment, is shown"). Since the importers chose not to assert their claims to Commerce, Lincoln, as surety, may therefore do so on their behalf.

Conclusion

As surety, Lincoln acquires the legal and contractual rights of its bond principals, in this instance certain U.S. importers, including their administrative and judicial rights as "interested parties," 19 U.S.C. § 1677(9), to appear and participate in antidumping and countervailing duty proceedings having a potential impact upon them. The Court finds subject matter jurisdiction over this matter in 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and § 1516a(a)(2)(B)(iii) and in 28 U.S.C. § 1581(c). Further, in accordance with the foregoing, Lincoln has standing to bring this action. *See* 28 U.S.C. § 2631(c). The government's motion to dismiss is therefore denied.

ERRATA

Lincoln General Insurance Co. v. United States, Court No. 03–00546, Slip Op. 04–73, dated June 18, 2004:

Page 1 – Remove Philip S. Gallas and Mark R. Ludwikowski from the list of attorneys for the plaintiff.

June 21, 2004

Slip Op. 04–74

WARNER-LAMBERT COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Court No. 01–00056

[Upon trial as to the classification of HALLS DEFENSE™ *Vitamin C Supplement Drops*, judgment for the defendant.]

Decided: June 21, 2004

Rode & Qualey (*Patrick D. Gill*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Beth C. Brotman*), of counsel, for the defendant.

Opinion

AQUILINO, Judge: This action has been designated a test case within the meaning of USCIT Rule 84(b). It contests revocation of U.S. Customs Service letter NY 832151 (Sept. 21, 1988), which ruled that "Halls Vitamin C Drops" be classified under the tariff schedules of the United States as medicament. In HQ 958150 (April 7, 1998), however, the Service, which is now known as Customs and Border Protection, U.S. Department of Homeland Security, came to conclude that the British merchandise at bar as plaintiff's trial exhibit 1, HALLS DEFENSE™ *Vitamin C Supplement Drops*, is sugar confectionery, classifiable under heading 1704 of the Harmonized Tariff Schedule of the United States ("HTSUS").

The subheading thereunder, 1704.90.35, pursuant to which duties at rates of 6.1 and 5.8 percent *ad volarem* have been collected, depending upon year of entry, appears in the HTSUS as follows:

	Sugar confectionary (including white chocolate), not containing cocoa:
	Chewing gum, whether or not sugar-coated.........
	Other:
	Confections or sweetmeats ready for consumption; Candied nuts ....
	Other:
	Cough drops ....
1704.90.35	Other .... [.]

During the decade that letter NY 832151 ruled Customs, the HTSUS had come to provide duty-free entry for Halls drops under subheading 3004.50.5010, to wit:

Medicaments . . . consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale:

* * *

Other medicaments containing vitamins or other products of heading 2936:

* * *

Other: . . . .

* * *

Other:
Single vitamins:
Combined with minerals or other nutrients. . . [.]

And the plaintiff prays for return to classification of its goods thereunder.[1]

I

The court's jurisdiction is based upon 28 U.S.C. §§ 1581(a), 2631(a). Trial was conducted pursuant to a pretrial order that set forth the following uncontested facts, among others:

2. . . . [T]he merchandise in issue . . . [is] packaged in lozenge form [and] sold in . . . flavors described as "ASSORTED CITRUS" and . . . as "STRAWBERRY".

3. The . . . ingredients in the assorted citrus flavor [are] approximately as follows: Sugar 51.80%, Glucose Syrup 44.20%, Sodium Ascorbate (Vitamin C) 1.69%, Citric Acid 1.83%, Natural flavors (orange, lemon, sweet grapefruit & menthol) 0.26%, Ascorbic [*sic*] Acid (Vitamin C) 0.22%, Colors (FD&C Red No. 40 and B-carotene) 0.01%.

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[1] In doing so, the plaintiff abandons an alternative claim that its drops are classifiable under HTSUS subheading 2936.27.00 ("Vitamin C (Ascorbic acid) and its derivatives"). *See* Pretrial Order, Schedule C, para. 17; Plaintiff's Proposed Findings of Fact and Conclusions of Law [hereinafter referred to as "Plaintiff's Brief"], p. 10

The court notes in passing the absence of any claim herein that the goods at issue are "Cough drops" within the meaning of HTSUS subheading 1704.90.25, *supra*, because Additional U.S. Note 11 states that, for purposes of that subheading, such drops

> must contain a minimum of 5 mg per dose of menthol, of eucalyptol, or of a combination of menthol and eucalyptol[,]

which requirement is not met in this matter. *See* Pretrial Order, Schedule C, paras. 3, 4, 12; and note 4, *infra*.

4. The . . . ingredients in the strawberry flavor [are] approximately as follows: Sugar 52.27%, Glucose Syrup 44.57%, Sodium Ascorbate (Vitamin C) 1.69%, Citric Acid 1.00%, Ascorbic Acid (Vitamin C) 0.22%, Natural & Artificial Flavors (strawberry & menthol) 0.21%, Colors (Carmine) 0.04%.

5. Each . . . drop (lozenge) contains 60 milligrams of Vitamin C.

6. 60 milligrams is the current recommended daily value of Vitamin C as set by the United States Food and Drug Administration. . . .

7. Vitamin C prevents scurvy.

8. Scurvy is the disease caused by the lack of Vitamin C.

9. Human beings, unlike many other mammals, are unable to make their own Vitamin C[ ] and therefore[ ] must meet their Vitamin C needs from external sources.

10. The Vitamin C in the imported Halls . . . drop[s], Sodium Ascorbate and Ascorbic Acid, is combined with other nutrients; namely, sugar, glucose syrup and citric acid.

11. Vitamin C is an important part of daily nutrition in that it maintains health and well being.

12. The average menthol content in the drops[ ] in issue[ ] is 0.025 percent.

13. The merchandise[ ] in issue[ ] is a dietary supplement, as defined by DSHEA [Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103–417] and FDA regulations.

14. The molecular formula for ascorbic acid is $C_6H_8O_6$, and the molecular formula for sodium ascorbate is $C_6H_7NaO_6$.

15. The imported product contains two forms of Vitamin C.

16. The imported merchandise is not marketed as preventing or curing any disease.

Examination by the court of plaintiff's merchandise, exhibit 1, shows it to be approximately three quarters of an inch square by some three-and-one-half inches long, wrapped in such manner as to display HALLS DEFENSE™ *Vitamin C Supplement Drops* on contiguous side panels to the left of "100% Daily Value of Vitamin C in each drop" and "9 DROPS", to the right of which references are the words "ASSORTED CITRUS" and "ALL NATURAL FLAVORS" imprinted on a green banner superimposed upon what apparently are intended to be likenesses of a grapefruit, lemon and orange. A third side panel specifies the ingredients of each, the name and address of its corpo-

rate distributor, the country of origin, and a chart of "Supplement Facts", including percentages of certain "Daily Values" in addition to vitamin C. The fourth wrapper panel is stamped with a code number and a bar code plus the following prose:

> Halls Defense Vitamin C Supplement Drops help keep you going, because each drop delivers 100% of the Daily Value of Vitamin C. So now, your family can soothe their throats with delicious, fruit flavored drops while getting the Vitamin C they need. Assorted Citrus Halls Defense Vitamin C Supplement Drops are available in the following all natural flavors: Lemon, Sweet Grapefruit, and Orange. Assortment in each package may vary. 100% Daily Value of Vitamin C in each drop.

In sum, the thrust of plaintiff's product, on its face, is that vitamin[2], which this court notices has been the subject of much scientific ergo commercial discourse.

Based upon the record adduced herein, the court can find that the availability of vitamin C in various forms and substances has relegated one of the oldest nutritional disorders of mankind, scurvy, to a low rung of medical concern. The same cannot be said for many other, such concerns *vis-à-vis* vitamin C. Nonetheless, studies have concluded that the vitamin may help forestall maladies such as cancer, cardiovascular deterioration, cataracts, pulmonary disease, although at least some of those studies have been carried out in conjunction with vitamin E, making it difficult to define the precise therapeutic or prophylactic properties of the C vitamin itself. What is know, and was confirmed at the trial, is that some oxygen is metabolized within the human body into "free radicals" that are

> highly reactive, toxic molecules, and the body has evolved some endogenous, defensive mechanisms, enzymes, to combat these toxic products but also relies very much on dietary factors such as essential vitamins like . . . C and . . . E . . . to combat the toxic effects of these metabolites.

Tr. p. 15. In other words, vitamin C "functions physiologically as a water-soluble antioxidant by virtue of its high reducing power." Defendant's Exhibit A (Institute of Medicine, Dietary Reference Intakes (DRI) for Vitamin C, Vitamin E, Selenium, and Carotenoids), p. 95 (2000). This antioxidant property is the basis of vitamin C's recommended dietary allowance ("RDA")[3], which is the

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[2] At the trial, plaintiff's product manager characterized the fact of 100 percent of the daily value of vitamin C as "a very compelling claim from a consumer standpoint". Transcript ("Tr."), p. 129. *See generally id.* at 129–33.

[3] *See, e.g., id.* at 78–79, Defendant's Exhibit A, pp. 12, 95.

> dietary intake level that is sufficient to meet the nutrient requirement of nearly all (97 to 98 percent) healthy individuals in a particular life stage and gender group.

Id. at 3. This allowance has not been set as a result of any therapeutic or prophylactic properties. *Compare* Tr., pp. 78–79, *with id.* at 119–21. In fact, the studies with regard thereto often entail doses of vitamin C in excess of the RDA. *See, e.g., id.* at 84.

II

The Customs letter HQ 958150 that overruled the Service's earlier ruling as to plaintiff's merchandise states in part:

> In NY 832151, Customs classified HVCDs in subheading 3004.50.5010, HTSUS, based upon the belief that Vitamin C imparted therapeutic or prophylactic character to the merchandise. Additional research indicates that Vitamin C has not been shown in the U.S. to have substances which imbue it with therapeutic or prophylactic properties or uses. Therefore, HVCDs are not classifiable as medicaments of chapter 30, HTSUS, and NY 832151 must be revoked.
>
> At its Eleventh Session on September 16, 1993, the Harmonized System Committee . . . greatly limited the list of ingredients which are considered to possess "therapeutic or prophylactic" value. This change was adopted in the form of two amendments to the ENs. . . .
>
> . . . [T]he Vitamin C contained in HVCDs is akin to other common lozenge additives which seem to possess curative properties, but do not satisfy the new, higher standard for "therapeutic or prophylactic" goods.
>
> Additionally, EN 30.40[ ] states . . . that:
>
> This heading includes pastilles, tablets, drops, etc., of a kind suitable **only** for medicinal purposes, such as those based on sulphur, charcoal, sodium tetraborate, sodium benzoate, potassium chlorate or magnesia. However, preparations put up as throat pastilles or cough drops, consisting essentially of sugars (whether or not with other foodstuffs such as gelatin, starch or flour) and flavouring agents (including substances having medicinal properties, such as benzyl alcohol, menthol, eucalyptol, and tolu balsam) . . . fall in **heading 17.04**.
>
> Pastilles, tablets, or drops, suitable only for medicinal purposes, are normally dispensed with a doctor's prescription, or are only purchased with the intention of curing an ailment. HVCDs are sold in a variety of stores together with other sugar-confectionary products "over the counter" without a pre-

scription. Therefore, Customs remains of the opinion that the merchandise is classifiable in heading 1704, HTSUS.[4]

A

A Customs ruling like the foregoing "is eligible to claim respect according to its persuasiveness", *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001), citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. Moreover, factual findings underlying a Customs classification are presumed by 28 U.S.C. § 2639(a)(1) to be correct[5], thereby placing the burden of proof upon the party protesting it. *See, e.g., Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002).

Judicial review of a classification is a two-step process in which the court determines the meaning of the relevant tariff terms and whether the merchandise in question satisfies that meaning. *E.g., id.* at 1352, citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1352, 1391 (Fed.Cir. 1994). The General Rules of Interpretation ("GRI") and the Additional U.S. Rules of Interpretation ("ARI") of the HTSUS are an element of this review process. *See, e.g., Carl Zeiss, Inc . v. United States*, 194 F.3d 1375, 1379 (Fed.Cir. 1999). *See also Rollerblade, Inc . v. United States*, 282 F.3d at 1351–52. Specifically, GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes". *See, e.g., Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed.Cir. 1998). Furthermore, a "use" provision, which "describ[es] articles by the manner in which they are used as opposed to by name"[6], is guided by ARI 1(a) to the effect that

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[4] Defendant's Exhibit T, p. 4 (boldface in original). "HVCDs" and "EN" refer respectively to plaintiff's product and to Explanatory Note(s) to the HTSUS. This ruling letter further states:

> The decision in NY 832151 was based on Customs belief that HVCDs had therapeutic or prophylactic properties. Since this is not the case, the merchandise cannot be classified in chapter 30, HTSUS. Likewise, the presence of sugars, flavorings and colorings renders them ineligible for classification in chapter 29, HTSUS. Therefore, HVCDs are classifiable as sugar confections of chapter 17, HTSUS. The lack of menthol, eucalyptol, or a combination thereof in the merchandise prevents its classification in subheading 1704.90.25, HTSUS. Sugar-based drops containing Vitamin C, but no menthol or eucalyptol, are therefore classifiable in the basket provision, subheading 1704.90.35, HTSUS. . . .

Id. at 6.

[5] *See, e.g., Universal Electronics Inc. v. United States*, 112 F.3d 488, 491–92 (Fed.Cir. 1997).

[6] *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1308 (Fed. Cir. 2003).

> a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use[.]

See, e.g., Primal Lite, Inc. v. United States, 182 F.3d 1362, 1363 (Fed.Cir. 1999).

On its face, HTSUS heading 3004, *supra*, is such a provision. *Cf.* HQ 964673 (Feb. 4, 2002).

(1)

The use contemplated by that heading is "therapeutic or prophylactic", the meaning of which this court must now determine. *See, e.g., Universal Electronics Inc. v. United States*, 112 F.3d 488 (Fed.Cir. 1997):

> . . . Questions of law such as [the proper interpretation of a particular tariff provision or term] lie within the domain of the courts, for "[i]t is emphatically the province and duty of the judicial department to say what the law is."

112 F.3d at 492, quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Absent a definition in the HTSUS, those terms are to be defined according to their common meaning, provided that such meaning is consistent with legislative intent. *See, e.g., Lonza, Inc. v. United States*, 46 F.3d 1098, 1106 (Fed.Cir. 1995), citing *Nippon Kogaku (USA), Inc. v. United States*, 69 CCPA 89, 92, 673 F.2d 380, 382 (1982). *See also Schott Optical Glass, Inc. v. United States*, 67 CCPA 32, 34, 612 F.2d 1283, 1285 (1979); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1379. To determine common meaning, the court "may consult dictionaries, lexicons, scientific authorities, and other such reliable sources". *Lonza, Inc. v. United States*, 46 F.3d at 1106, citing *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 69 CCPA 128, 133–34, 673 F.2d 1268, 1271 (1982).

The term "therapeutic" is defined in Stedman's Medical Dictionary, page 1587 (25th ed. 1990), as "[r]elating to therapeutics or to the treatment of disease". Webster's Third New International Dictionary Unabridged, page 2372 (1981), defines the term as "of or relating to the treatment of disease or disorders by remedial agents or methods: CURATIVE, MEDICINAL". Consistent with these definitions, the court in *Richards Medical Co. v. United States*, 13 CIT 519, 521, 720 F.Supp. 998, 1000 (1989), *aff'd*, 910 F.2d 828 (Fed.Cir. 1990), for example, accepted therapeutic as "having healing or curative powers".

Stedman's Medical Dictionary, page 1268, defines "prophylactic" as "1. Preventive; preventing disease; relating to prophylaxis. 2. An agent that acts to prevent a disease." That term is defined by Webster's Third New International Dictionary Unabridged on page

1818 as "guarding from disease: preventing or contributing to the prevention of disease".

The plaintiff contends that its drops have

> prophylactic or therapeutic uses in the prevention or cure of, *inter alia*, the following diseases: scurvy, cancer, pulmonary and cardiovascular disease, cataracts, diabetes, osteoporosis, periodontal disease, hypertension, reduction of mortality, and diseases and illnesses associated with the reproductive function as well as the cognitive and immune functions.

Pretial Order, Schedule C–1, para. 2. In support, it relies primarily on the opinion of its expert, the Associate Director of the U.S. Department of Agriculture's Human Nutrition Research Center on Aging at Tufts University, Professor Jeffrey Blumberg, Ph.D., F.A.C.N., C.N.S. It produced at the trial both him and his report(s) entitled Scientific Substantiation of the Benefits of Vitamin C on Vitality and Well-Being (Sept. 1998) and Scientific Substantiation of the Benefits of Vitamin C on Vitality and Well-Being[,] An Update of the Scientific Literature (July 1998–December 2001) (Jan. 2002), received in evidence together as plaintiff's exhibit 2.

The defendant challenges the epidemiological nature of this analysis, its expert taking the position at trial that such an approach seeks "associations" and "cannot lead to a definition of cause and effect".[7] The defendant cites no law that stands for the proposition that evidence of cause and effect must be presented in order to draw

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[7] Tr., p. 253. *See* Defendant's Exhibit B [Report of Robert E. Olson, M.D., Ph.D.], p. 17 ("I am not impressed with the results of the epidemiologic data which Dr. Blumberg quotes since they represent associations but not proof of cause and effect").

The plaintiff objected to admission into evidence of this exhibit b. First, it argued that this report fails to comply with USCIT Rule 26(a)(2)(B) in that the defendant was "required to indicate the compensation paid to the Witness." Tr., p. 237. Counsel also claimed that portions of the report are legal argument and views that have little bearing on the scientific expertise of Dr. Olson and thus violate the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See id.*; Plaintiff's Brief, p. 8.

The court reserved decision. It now concludes that plaintiff's second claim has merit; the first does not. USCIT Rule 37(c)(1) states:

> A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence . . . any witness or information not so disclosed.

While true that Dr. Olson's compensation is not disclosed in his report, the plaintiff was notified thereof prior to its production. *See* Tr., p. 238. Thus, defendant's approach did not prejudice the plaintiff and does not require exclusion of the report under the foregoing rule. *See, e.g., Norbrook Labs, Ltd. v. G.C. Hanford Mfg. Co.*, 297 F.Supp.2d 463, 481 (N.D.N.Y. 2003) ("Failure to comply with the mandate of [Rule 37] is harmless when there is no prejudice to the party entitled to the disclosure"), quoting *Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 680 (D.Kan. 1995).

To accept testimony as expert, the court must bind that it is based on "scientific knowledge" and "will assist the trier . . . to understand a fact in issue". *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 589–90, 592. *See also Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1126 (D.C.Cir. 2001); Federal Rule of Evidence 702 (2000):

scientific conclusions, nor has the court found any. While proof of cause and effect is an element of toxic tort actions[8], for example, it is not required in a matter like this. Rather, the plaintiff at bar can overcome the presumption of correctness with a preponderance of the evidence, "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it". *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed.Cir. 1993), quoting *Hale v. Dep't of Transportation*, 772 F.2d 882, 885 (Fed. Cir. 1985).

Scientific evidence need not be compelling, definitive, conclusive, or cause-and-effect certain. In upholding an administrative decision to promulgate regulations reducing the lead content in gasoline, for example, the court in *Ethyl Corp. v. EPA*, 541 F.2d 1, 37–38 (D.C.Cir. 1976), stated:

> . . . [W]e need not seek a single dispositive study that fully supports the Administrator's determination. Science does not work that way. . . . [T]he Administrator's decision may be fully supportable if it is based, as it is, on the inconclusive but suggestive results of numerous studies. By its nature, scientific evi-

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> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. . . .

The Court in *Daubert* stressed that "the adjective 'scientific' implies a grounding in the methods and procedures of science". 509 U.S. at 589–90. Paragraphs 9–12 of defendant's exhibit B, which characterize the history of this action and also the law, are inadmissable as not within the scope of the scientific expertise of Dr. Olson. *See, e.g., Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715–16 (8th Cir. 2001):

> . . . Once initial expert qualifications and usefulness . . . are established, . . . a [trial] court must continue to perform its gatekeeping role by ensuring that the actual testimony does not exceed the scope of the expert's expertise, which if not done can render [the] testimony unreliable under Rule 702, *Kumho Tire*, and related precedents.

In this action, an expert is to provide opinion that may be helpful in determining the nature of the merchandise and any therapeutic or prophylactic properties or uses. Attempted recital of the case history, including an incorrect summary of the parties' arguments and an interpretation of the law, does not advance that objective.

While the plaintiff broadly invokes the "standards" of *Daubert*, the court need not delve into the reliability factors for which that case stands. The inquiry here pertains to the scope of expert testimony under Rule 702, *supra*, which "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify". 509 U.S. at 589. Finding that paragraphs 9–12 of Dr. Olson's report must be disregarded, resort to those factors is unnecessary. *See, e.g., Libas, Ltd. v. United States*, 193 F.3d 1361, 1367 (Fed.Cir. 1999):

> . . . There is no iron law that the *Daubert* factors be applied in Customs classification cases. The Court of International Trade obviously need not use them in every case, or even in most such cases. These factors are primarily applicable when the question involves a technical process where the reliability of a scientific or technical methodology has been raised as an issue.

[8] *See, e.g., Raynor v. Merrell Pharmaceuticals Inc.*, 104 F.3d 1371 (D.C.Cir. 1997).

> dence is cumulative: the more supporting, albeit inconclusive, evidence available, the more likely the accuracy of the conclusion.

See also Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 590 ("it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science" (citations omitted)); *Hodges v. Sec'y of Dep't of Health & Human Services*, 9 F.3d 958, 966–67 (Fed.Cir. 1993) ("The statutory standard of a simple preponderance of evidence precludes the imposition of the standard of scientific certainty" (citation omitted)); *LeFevre v. Sec'y, Dept of Veterans Affairs*, 66 F.3d 1191, 1199 (Fed.Cir. 1995) ("The standard for determining whether a positive association exists is whether the 'credible evidence' for the association equals or outweighs the credible evidence against it"). Hence, to the extent that defendant's expert is opining about the value of epidemiological research to prove or disprove scientific theory, his criticism misses the mark.

If, however, defendant's critical stance is not just general disagreement, but derives from the standard governing heading 3004, it comes closer to the point. Though not exactly cause and effect, this court understands that heading as requiring that a substance have some recognizable "medicinal" impact. The Explanatory Notes to heading 3004 state that

> [t]hroat pastilles or cough drops containing substances having medicinal properties . . . remain classified in this heading . . . **provided** that the proportion of those substances in each pastille or drop is such that they are thereby given therapeutic or prophylactic uses.[9]

Though not binding, such notes are instructive with regard to tariff provisions. *E.g.*, *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed.Cir. 1994), citing *Lynteg, Inc. v. United States*, 976 F.2d 693, 699 (Fed.Cir. 1992). The significance of a connection between a dose and therapeutic or prophylactic properties also finds support in the body of the HTSUS itself. To be classified in heading 3004, qualifying medicaments must be "put up in measured doses or in forms or packings for retail sale". Again, resort to the explanatory notes provides guidance and affirms the importance of maintaining the substances "ready for taking as single doses for therapeutic or prophylactic use" or, alternatively, in a packing where because of the "presence of appropriate indications (. . . statement of dose, etc. . . .) [the products] are clearly intended . . . for [therapeutic or prophylactic] purposes."

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[9] Emphasis in original. The Explanatory Notes to heading 1704 complement those to 3004 with similar reasoning.

In short, dosage cannot be separated from therapeutic or prophylactic properties. A measured dose is not merely a certain amount; it should contemplate an effect therefrom. Hence, the dose must be viewed as a way to link the properties of a substance with that effect. Here, the plaintiff must show that a specific quantity of vitamin C, *e.g.*, 60 milligrams per day, can help prevent disease. It would make little sense to classify a product as a medicament merely because of a vitamin content without first finding that that particular content could or does precipitate the therapeutic or prophylactic properties contemplated by heading 3004. Indeed, the use provision guards against that.

In this action, the role of vitamin C in treating and preventing scurvy is uncontested. That that malady is of little moment now in this land of fruits and imports does not diminish that therapeutic and prophylactic phenomenon. As for the numerous other diseases that are not yet under such control, at the trial plaintiff's expert seemingly chose his words carefully, for example: "there's a number of epidemiological studies showing . . ." [cancer] Tr., p. 18; "there has been a remarkably consistent body of evidence showing . . ." [cataracts] *id.* at 19; "there are a number of studies . . ." [pulmonary disease and function] *id.* at 23; "there actually have been a number of clinical trials showing" [hypertension] *id.* at 21. This stands in contrast to other qualified language to describe the strength of studies examining other diseases, *e.g.*, the evidence is "not so direct" [diabetes] *id.* at 20; there were "really just a few studies" [mortality] *id.*; "a very limited number of studies" [bone health] *id.* at 22.

On his part, defendant's expert generally sought to disagree that vitamin C has therapeutic or prophylactic properties[10], but without conclusive success. In fact, defendant's own exhibit A, the Institute of Medicine's Dietary Reference Intakes (DRI) for Vitamin C etc., supports the view that studies examining cardiovascular disease, cancer, cataracts, and asthma and obstructive pulmonary disease "suggest a protective effect of Vitamin C".[11] Affirming this view, Dr. Olson himself conceded that plaintiff's studies were "suggestive"[12] and thus compatible with the standard enunciated hereinabove.

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[10] Dr. Olson testified, for example, that the evidence concerning vitamin C's therapeutic or prophylactic properties is "unproven", that he was "not impressed with the results of the epidemiologic data which Dr. Blumberg quotes", and that he "disagree[s] that the data available permit [Dr. Blumberg']s conclusion". Tr., p. 211; Defendant's Exhibit B. pp. 17–18.

[11] Defendant's Exhibit A, pp. 122, 125–26. The Institute of Medicine was unable to reach that point for any of the other chronic diseases under study.

[12] Tr., p. 260:

> . . . I will say the whole field . . . put forth by the Plaintiff is suggestive data not compelling data. It is suggestive, but it has not stood the test of scientific rigor that requires that it be tested experimentally and in clinical studies, and it yields such positive results that it is compelling.

Id.

Whatever the evidence as to vitamin C *per se*, the issue herein is whether goods containing that vitamin, but mostly sugar and glucose syrup, have therapeutic or prophylactic properties. The defendant argues that, of

> the 107 publications cited by Dr. Blumberg, only 49 employ only vitamin C as the agent for study. The majority of the papers 58 (54%) involve other antioxidants in addition to vitamin C (vitamin E, carotinoids and selenium).

Defendant's Exhibit B, p. 16. *See also* Tr., p. 60. In addition, the defendant points out that many of the studies focus on quantities of vitamin C that far exceeded the amount found in the Halls Drops. *See id.* 84.

This court's understanding of HTSUS heading 3004 is that there must be a connection between a dosage and any therapeutic or prophylactic effect therefrom. To this end, and thus to link the properties of vitamin C in the abstract with those of the drops at issue, the plaintiff relies on the fact that each contains 100 percent of the daily value. But that value is not shown on the record developed to cure or prevent disease other than scurvy. The facts, as presented on both sides, simply do not support a grander finding. The Food and Nutrition Board, which helps set the RDA[13], found that even the studies suggestive of an association between vitamin C and therapeutic or prophylactic properties were of limited utility in the derivation of an appropriate vitamin C intake level because,

> [a]lthough many of the [ ] studies suggest a protective effective of vitamin C . . . , the data are not consistent or specific enough to estimate a vitamin C requirement. . . .

Defendant's Exhibit A, pp. 122, 125–126. Plaintiff's expert confirmed this inability to link a particular dose with a therapeutic or prophylactic effect:

> . . . What I'm merely saying is that the scientific studies show that there is an association of benefit from increasing Vitamin C intakes. . . .
>
> [T]here's a benefit for Vitamin C, but I am unable, as was the Food and Nutrition Board, . . . to make a quantitative decision on what the dose would be. Part of that is the challenge that

[13] Though not interchangeable, the terms daily value and recommended dietary allowance are both relevant to the facts of this action. While that allowance sets an intake level for a particular life stage and gender group, the daily value averages levels. In addition, reference is made to the DRI, which are the focus of defendant's exhibit A. This approach provides a new method for quantitative estimates of nutrient intakes, which include the Recommended Dietary Allowance, in addition to the Adequate Intake, the Tolerable Upper Intake Level, and the Estimated Average Requirement. *See* Defendant's Exhibit A.

> there are a lot of different diseases, and it's very likely that the doses needed in each case might be different.

Tr., p. 119.

(2)

Be this inability as it is, were this court to find plaintiff's product to be a medicament (at least because of scurvy), the issue remains whether or not that is its principal use:

> The purpose of "principal use" provisions in the HTSUS is to classify particular merchandise according to the ordinary use of such merchandise. . . .

Primal Lite, Inc. v. United States, 182 F.3d 1362, 1364 (Fed.Cir. 1999). That has been defined as the "predominant use, rather than simply one possible use"[14] and the "use which exceeds any other *single* use". *Lenox Collections v. United States*, 20 CIT 194, 196 (1996) (italics in original). The Explanatory Notes to heading 3004 suggest an even more stringent standard. They state that "heading [3004] includes pastilles, tablets, drops, etc., of a kind suitable **only** for medicine purposes" (emphasis in original).

Whatever the definition, the plaintiff has failed to bear its burden. The following factors have been considered to ascertain the nature of goods:

> (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels, class or kind of trade in which the merchandise moves; (4) the environment of the sale (*i.e.*, accompanying accessories and the manner in which the merchandise is advertised and displayed); (5) usage, if any, in the same manner as merchandise which defines the class; (6) the economic practicality of so using the import; and (7) the recognition in the trade of the use.

Minnetonka Brands, Inc. v. United States, 24 CIT 645, 651–52, 110 F. Supp. 2d 1020, 1027 (2000), citing *United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373, 377 (1976). The plaintiff did not offer evidence as to five of them, namely, those numbered (2), (3), (5), (6) and (7).[15] Rather, it relied almost exclusively on the label-

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[14] *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1311 (Fed.Cir. 2003).

[15] In fact, the only evidence as to this last factor was offered by the defendant, namely, a manufacturer's invoice for an entry at issue in this action referring to the goods as "VIT C confectionary". Tr., p. 150. *See id.* at 150–54.

Although invoice descriptions are not controlling for classification purposes, they are "evidence which can aid the Court in reaching the property classification." *North American Processing Co. v. United States*, 22 CIT 5, 58 (1998), citing *Peterson Electro Musical Products*

ling and marketing of the drops within the ambit of factor number four.[16]

As described in part I above, in addition to vitamin C, the packaging of plaintiff's product, exhibit 1, refers to "help keep you going", to the ability to soothe throats, and to all natural fruit flavors. Given these messages, plaintiff's product manager testified that the product is not marketed with any use in mind, leaving that decision to the consumer:

> Q When you market this product to the consumer, do you leave it to the consumer to decide what benefits he or she wants from the product?
>
> A Absolutely.
>
> Q Do you let the consumer decide rather than pushing a specific remedy yourself?
>
> A Yes, we do, and the reason we do is to create the most ubiquitous appeal. By pigeon-holing ourselves into different areas, it just doesn't make sense. It makes more sense in terms of trying to sell the most product to allow consumers to decide for themselves why they want Vitamin C. We just kind of really market this as Vitamin C and allow them to decide why they want it.

Tr., p. 133.

The court must decide whether this approach, combined with the words and symbols on the drops package, circumscribe a medicament for use to treat or prevent at least scurvy. It cannot do so. Even if the court were to find that the Halls lozenges are marketed as vitamin C, it could not, without more, interpret that to mean that they are principally for therapeutic and prophylactic use — to treat or prevent disease. To so decide on this record would be to find that vitamin C has become synonymous with such use. Neither the record nor the reference to 100 percent of the daily value of vitamin C establishes such synonymity. Moreover, while the better-educated consumer might understand the significance of that value, such individual understanding itself could not constitute principal use.

The other package references provide different indications of use. First, the soothing of throats is not derived from the vitamin C. *See, e.g.*, Tr., pp. 89–90 ("Most likely Vitamin C contributes little to nothing to the throat-soothing properties of the lozenge"). Rather, that phenomenon is due to the sugar content. *See id.* at 89. Hence, the

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v. United States, 7 CIT 293, 295 (1984) (they "are evidence of what the parties, and presumably, the commercial world, consider the merchandise to be").

[16] Although the general physical characteristic of the merchandise, its lozenge form, is consistent with classification as a medicament, that configuration does not foreclose other intake.

packaging of the drops clearly encourages a use of the merchandise not founded on their vitamin C and that has no connection to any therapeutic or prophylactic properties associated therewith.

Second, to "help keep you going" is too vague to project any particular, principal use. While that kind of assistance might derive from the intake of vitamin C in some way, such sensation would understandably be outside the parameters of "therapeutic or prophylactic" as defined by the Explanatory Notes to heading 3004:

> [T]his heading **excludes** food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being but have no indication as to use for the prevention or treatment of any disease or ailment.

Emphasis in original. On this point, the court concurs with the position articulated by Customs in HQ 964188 (April 3, 2002):

> Although no clear criteria is [*sic*] provided in either the tariff text or the ENs to differentiate products which are medicinal preparations from those which are designed to maintain general health and well-being, there is a definite distinction made between them.

This is supported by *H. Reisman Corp. v. United States*, 17 CIT 1260 (1993), *appeal dismissed*, 39 F.3d 1195 (Fed.Cir. 1994), wherein the court concluded that a substance for mixing vitamin B-12 into animal fee is not a medicament for purpose of heading 3003.90.00, finding that

> the merchandise is not used in a therapeutic or prophylactic manner beyond the purposes provided by any nutrient, including ordinary grain food or food of any kind.

Another explanatory note with regard to HTSUS heading 3004 states:

> On the other hand, the heading covers preparations in which the foodstuff or the beverage merely serves as a support, vehicle or sweetening agent for the medicinal substances. . . .

Cf. Tr., pp. 39–40. Before concluding that the Halls drop is a vehicle for vitamin C's therapeutic or prophylactic properties, however, it must have been proven that the product's principal use is for its vitamin C content and for the properties associated therewith. This, the plaintiff has failed to do.

Third, drawing attention to taste and flavor also tends to expand the use of the drops more than the reference to vitamin C content might tend to limit it. Of course, the goods can be "delicious" or "fruit flavored", but, absent record evidence of principal use for therapeutic or prophylactic purposes, those references distend plaintiff's preferred finding. That is, if the packaging were permitted to, and did in

fact, refer to scurvy, with indication of treatment or prevention thereof, then references to gustatory sense would more easily be considered as ancillary.

Here, however, Halls consumers have packaged, printed inducements that do not pinpoint classification under HTSUS heading 3004, *e.g.*, ingest the lozenges for the vitamin C, but not as that substance relates to therapeutic or prophylactic properties; soothe thy self for reasons not associated with that vitamin; or swallow the drops for reasons not yet substantiated by science or proven in this test case.

III

In conclusion, many substances have medicinal properties. Not all of them, however, are medicaments within the meaning of heading 3004. Here, the plaintiff has failed to satisfy its burden of proving that the principal use of its Halls drops corresponds to their therapeutic or prophylactic properties *vis-à-vis* scurvy or any other disease. Absent a record that classification under HTSUS heading 3004 is compelled by a preponderance of evidence adduced thereon, this court concurs that the HTSUS "basket provision", subheading 1704.90.35, is where the HALLS DEFENSE™ *Vitamin C Supplement Drops* must and do land. Judgment will enter accordingly.

Slip Op. 04–75

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

BRATSK ALUMINUM SMELTER and RUAL TRADE LIMITED, Plaintiffs, and SUAL HOLDING and ZAO KREMNY; and GENERAL ELECTRIC SILICONES LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and GLOBE METALURGICAL INC. and SIMCALA, INC., Defendant-Intervenors.

Consol. Court No. 03–00200

This consolidated action concerns the motions of Brastk Aluminum Smelter ("Brastk") and Rual Trade Limited and plaintiff-intervenors, SUAL Holding, ZAO Kremny and General Electric Silicones LLC ("General Electric") (collectively, "Plaintiffs") pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of the United States Trade Commission's ("ITC" or "Commission") final determination entitled *Silicon Metal from Russia* ("*Final Determination*"), 68 Fed. Reg. 14,260 (Mar. 24, 2003), in which the ITC found that an industry in the United States is materially injured by reason of imports of silicon metal from Russia that are sold in the United States at less than fair value ("LTFV"). The views of the Commission were published in March 2003, in *Silicon Metal From Russia* ("*ITC Determination*") Inv. No. 731–TA–991 (Final), USITC Pub. 3584 (Mar. 2003). Plaintiffs generally argue that the Commission erred in determining that the domestic silicon metal in-

dustry was materially injured by reason of silicon metal imports from Russia. Specifically, Plaintiffs contend, *inter alia*, that the ITC erred in concluding that: (1) the silicon metal prices in all three market segments key off the price for secondary aluminum grade silicon metal; (2) Russian imports were priced lower than nonsubject imports; and (3) Russian imports caused injury to the United States domestic industry.

Held: Plaintiffs' motions for judgment on the agency record is granted in part and denied in part. Case remanded to the Commission with instructions: (1) to explain its reasons for accepting evidence that "spot" prices may effect contract prices while rejecting contradictory evidence; (2) to explain the significance or effect of the similar pricing trends of the different market segments; and (3) if the Commission cannot provide sufficient reasons or explanations, to change its determination accordingly.

[Plaintiffs' 56.2 motions is granted in part and denied in part. Case remanded.]

Dated: June 22, 2004

Shearman & Sterling LLP (*Thomas B. Wilner*, *Jeffrey M. Winton*, *Quentin M. Baird* and *Sam J. Yoon*) for Brastk Aluminum Smelter and Rual Trade Limited, plaintiffs.

Dewey Ballantine LLP (*Michael H. Stein* and *Nathaniel M. Rickard*) for General Electric Silicones LLC, plaintiff-intervenor.

Vorys, Sater, Seymour and Pease LLP (*Frederick P. Waite* and *Kimberly R. Young*) for SUAL Holding and ZAO Kremny, plaintiff-intervenors.

Lyn M. Schlitt, General Counsel; *James M. Lyons*, Deputy General Counsel, Office of the General Counsel, United States International Trade Commission (*Irene H. Chen* and *Andrea C. Casson*) for the United States, defendant.

Piper Rudnick LLP (*William D. Kramer*, *Clifford E. Stevens, Jr.* and *Martin Schaefermeier*) for Globe Metalurgical Inc. and SIMCALA, Inc., defendant-intervenors.

OPINION

TSOUCALAS, Senior Judge: This consolidated action concerns the motions of Brastk Aluminum Smelter ("Brastk") and Rual Trade Limited and plaintiff-intervenors, SUAL Holding, ZAO Kremny and General Electric Silicones LLC ("General Electric") (collectively, "Plaintiffs") pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of the United States Trade Commission's ("ITC" or "Commission") final determination entitled *Silicon Metal from Russia* ("*Final Determination*"), 68 Fed. Reg. 14,260 (Mar. 24, 2003), in which the ITC found that an industry in the United States is materially injured by reason of imports of silicon metal from Russia that are sold in the United States at less than fair value ("LTFV"). The views of the Commission were published in March 2003, in *Silicon Metal From Russia* ("*ITC Determination*"), Inv. No. 731–TA–991 (Final), USITC Pub. 3584 (Mar. 2003). Plaintiffs generally argue that the Commission erred in determining that the domestic silicon metal industry was materially injured by reason of silicon metal imports from Russia. Specifically, Plaintiffs contend, *inter alia*, that the ITC erred in concluding that: (1) the silicon metal prices in all three market segments key off the price for secondary aluminum grade silicon metal; (2) Russian imports were priced

lower than non-subject imports; and (3) Russian imports caused injury to the United States domestic industry.

BACKGROUND

On March 7, 2002, the United States domestic industry filed an antidumping petition with the Commission alleging that it was materially injured or threatened with material injury by reason of LTFV imports of silicon metal from Russia. *See Final Determination*, 68 Fed. Reg. at 14,260. On April 29, 2002, the Commission published its preliminary determination that there was a reasonable indication that the United States domestic industry is materially injured by reason of LTFV imports of silicon metal from Russia. *See Silicon Metal From Russia*, 67 Fed. Reg 20,993 (Apr. 29, 2002). The United States Department of Commerce ("Commerce") published its final determination that imports of silicon metal from Russia are being, or are likely to be sold in the United States at LTFV, *see Notice of Final Determination of Sales at Less Than Fair Value for Silicon Metal From the Russian Federation*, 68 Fed. Reg. 6,885 (Feb. 11, 2003), and subsequently published an amended final determination. *See Notice of Amended Final Determination of Sales at Less Than Fair Value for Silicon Metal From the Russian Federation*, 68 Fed. Reg. 12,037 (Mar. 13, 2003). On March 26, 2003, Commerce published an antidumping duty order with regard to silicon metal from Russia. *See Antidumping Duty Order on Silicon Metal From Russia*, 68 Fed. Reg. 14,578 (Mar. 26, 2003).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2000) and 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

The Court will uphold an ITC determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Moreover, "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the mat-

ter been before it *de novo.*' " *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Universal Camera*, 340 U.S. at 488).

DISCUSSION

I. Statutory Background

In the final phase of an antidumping and countervailing duty investigation, the Commission determines whether a United States industry is materially injured by reason of subject imports. *See* 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1) (2000). Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (2000). In making a material injury determination, the ITC must consider: (1) the volume of the subject imports; (2) the subject imports' effect on prices for the domestic like product; and (3) the impact of the subject imports on the domestic industry in the context of production operations within the United States. *See* 19 U.S.C. § 1677(7)(B). In addition to these factors, the ITC "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii). The statute explicitly describes the factors the ITC should consider in making its determination as to volume, price and the impact on the affected domestic industry, *see* 19 U.S.C. § 1677(7)(C), yet no single factor is dispositive. *See* 19 U.S.C. § 1677(7)(E)(ii).

In evaluating the effect of subject imports on domestic prices, the Commission must consider whether there has been significant price underselling compared with the price of domestic like products in the United States. *See* 19 U.S.C. § 1677(7)(C)(ii)(I). The Commission also considers whether subject imports depress, suppress or prevent domestic price increases to a significant degree. 19 U.S.C. § 1677(7)(C)(ii)(II). In considering the impact of the subject imports, the ITC must assess "all relevant economic factors which have a bearing on the state of the [United States] industry." 19 U.S.C. § 1677(7)(C)(iii). In addition, the ITC must consider such economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.*

II. The Commission Properly Determined that Subject Import Volume Was Significant

A. The ITC's Findings

In the case at bar, the Commission found that the volume and increase in volume of subject imports was significant. *See ITC Determination* at 10–11. The ITC found that the quantity of subject imports increased by 35.8 percent from 1999 to 2001 and by 38.6 percent from 2000 to 2001, after registering a slight decrease from 1999 to 2000. *See id.* at 10. Moreover, the overall volume of subject

imports was 57.6 percent higher during the January to September 2002, period than it had been during the comparable period in 2001, which allowed Russia to become the largest single source of silicon metal imports during the 2002 period. *See id.* The Commission also noted that "subject import volume increased during the [period of investigation] despite the inability of Russian producers to manufacture low-iron silicon metal due to the composition of quartzite deposits in Russia."[1] *Id.* The ITC found that "[s]ubject imports gained market share [in the United States] at the same time that apparent [United States] consumption declined . . . from 62.2 percent in 1999 to 57.0 percent in 2000 and 54.6 percent in 2001, and was 39.7 percent in interim 2002 compared to 55.4 percent in interim 2001." *Id.* From 1999 to 2000, non-subject imports' market share decreased from 35.5 percent to 33.2 percent and domestic producers' market share also fell from 57.0 percent to 54.6 percent while the market share of subject imports rose from 7.5 percent to 12.3 percent. *See id.* at 9–10.

B. Contentions of the Parties

1. Plaintiffs' Contentions

Plaintiffs contend that Russian producers cannot compete in the primary aluminum market because of their inability to produce low-iron silicon metal. *See* Br. Pls.' Brastk & Rual Trade Ltd. & Pl.-Intervenor General Electric Supp. Pls.' R. 56.2 Mots. J. Agency R. ("Plaintiffs' Br.") at 9. Plaintiffs concede that "[t]he silicon metal products sold by [United States] producers are generally interchangeable with the products imported from Russia and from other countries." *Id.* The production of low-iron silicon by Russian producers, however, is generally impractical because the quartzite used by Russian producers has a high level of iron. *See id.* Plaintiffs argue that United States producers, in turn, "target their production specifically to meet the requirements of the primary aluminum segment." *Id.*

In addition, Plaintiffs argue that the ITC should have used 1998 rather than 1999 as the starting point for its volume analysis. *See id.* at 44 n.99. In doing so, the Commission "would have found that imports from Russia had actually decreased throughout the investigation period." *Id.* Plaintiffs also note that Russian imports peaked in 1994, totaling 62,990 tons but fell in 1999 to 25,158 tons and further declined in 2000 to 24,463 tons. *See id.* at 12. In contrast, non-subject imports showed an opposite trend with imports increasing

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[1] Quartzite is the primary raw material needed to produce silicon metal. *See ITC Determination* at I–7. The mined quartzite "is combined with a carbon-containing reducing agent . . . and a bulking agent . . . in a submerged-arc electric furnace to produce molten silica, which is reduced to silicon metal." *Id.*

between 1994 and 2000. *See id.* Plaintiffs maintain that the data supports a finding that "the volume of non-subject imports dwarfed the volume imported from Russia during the last three years." *Id.* Accordingly, Plaintiffs contend that non-subject imports "were a much larger factor in the [United States] market than imports from Russia." *Id.* at 13.

2. ITC's Contentions

The Commission replies that its subject import volume findings were reasonable and supported by substantial evidence. *See* Def. ITC's Opp'n Pls./Pl.-Intervenors' Mots. J. Agency R. ("ITC's Br.") at 15–19. The volume of subject imports "climbed by 35.8 percent from 1999 to 2001 and by 38.6 percent from 2000 to 2001." *Id.* at 15. Moreover, the overall volume of subject imports was higher between January to September of 2002 than it had been during the same period in 2001. *See id.* at 17. In contrast, non-subject import volume did not increase as much during the same period. *See id.* at 17. The ITC maintains that the "substantial and continued increase occurred as Russia became the largest source of silicon metal imports prior to suspension of liquidation in 2002, despite the inability of Russian producers to produce low-iron silicon metal for the primary aluminum market." *Id.* at 15–16.

The ITC also asserts that respective market share trends of the domestic industry, subject and non-subject imports during the period of investigation further supports its volume findings. The ITC concedes that, in the 1999 to 2000 period, non-subject imports' market share rose while the domestic industry lost market share and subject imports' market share remained flat. *See id.* at 16. During the 2000 to 2001 period, however, the market share of subject imports increased at the expense of non-subject imports and domestic producers. *See id.* The Commission asserts that it attributed part of the domestic industry's market share loss to non-subject imports "but, in light of the absolute and proportional increases by subject imports in interim 2002, [it] reasonably concluded that the domestic industry lost market share in significant part to subject imports." *See id.* at 16–17 (quotation omitted).

The ITC further points out that the chemical and not primary aluminum segment is the domestic industry's largest customer market. *See id.* at 17. In 2001, the primary aluminum market segment was third in terms of the percentage of United States producers' domestic shipments. *See id.* at 17–18 (citing proprietary information). The Commission found that "subject import suppliers' percentage of domestic silicon metal shipments to the chemical sector, where the majority of domestic product competes, increased substantially during the [period of investigation]." *Id.* at 18.

The Commission maintains that it followed its usual practice of collecting and analyzing data for a three year period. *See id.* Here,

the Commission analyzed data from 1999 to 2001 and interim periods January to September 2001 and 2002. *See id.* The ITC asserts that its period of investigation customarily consists of the most recent three calendar years and applicable interim periods. *See id.* During the final investigation, Plaintiffs requested that the period of investigation be expanded, but the Commission found that "plaintiffs provided no good reason for this deviation from the [period of investigation], other than that it might skew the data more favorably for them." *Id.* at 19. The ITC declined to expand the period of investigation because it reasoned that such an expansion to include volume data without obtaining relevant price and market conditions would yield an incomplete analysis. *See id.*

3. Defendant-Intervenors' Contentions

Defendant-Intervenors generally agree with the arguments made by the ITC. *See* Def.-Intervenors' Br. Opp'n Mots. J. Upon Agency R. ("Defendant-Intervenors' Br.") at 18–20. Defendant-Intervenors add that "Russian imports continued to flood the [United States] market during the first three quarters of 2002." *Id.* at 19. Over the period of investigation, the share of the United States silicon metal market more than doubled for Russian imports, while United States producers' market share declined by twenty percent. *See id.*

C. Analysis

With respect to its volume determination, the Commission must consider whether the volume of subject imports is significant. *See* 19 U.S.C. § 1677(7)(C)(i). In reviewing the *ITC Determination*, the court's role is limited to determining whether the Commission's findings are supported by substantial evidence and the reasonable inferences therefrom. *See Daewoo Elecs. Co., Ltd. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993). Under this standard, the question for this Court is whether the record supports the Commission's conclusions. *See id.* While different conclusions may be drawn from record evidence, the Commission has the discretion to reasonably interpret the evidence and its significance. *See id.* Accordingly, this Court "may not reweigh the evidence or substitute its judgment for that of the ITC." *Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 1008–09, 33 F. Supp. 2d 1082, 1104 (1998) (quotation and citations omitted).

The Court finds that there is substantial evidence supporting the Commission's findings that subject import volume was significant. The volume of subject imports increased by 35.8 percent from 1999 to 2001 and by 38.6 percent from 2000 to 2001, after registering a slight decrease from 1999 to 2000. *See ITC Determination* at 10. In addition, the overall volume of subject imports was 57.6 percent higher during the January to September 2002, period than it had been during the comparable period in 2001. *See id.* From 1999 to

2001, non-subject imports' market share decreased from 35.5 percent to 33.2 percent and domestic producers' market share also fell from 57.0 percent to 54.6 percent while the market share of subject imports rose from 7.5 percent to 12.3 percent. *See id.* at 9–10. Based on record evidence, it was reasonable for the Commission to conclude that an increase of volume over the period of investigation was significant both in absolute terms and relative to consumption in the United States. *See id.* at 9–11.

Furthermore, Plaintiffs' arguments as to the period of investigation used by the ITC are without merit. Plaintiffs contend that if the ITC had used 1998 as the starting point for its volume analysis, the Commission would have found that the volume of subject imports decreased during the period of investigation. *See* Plaintiffs' Br. at 44 n.99. The statute, however, does not direct the ITC to use a specific period of time for its analysis. Accordingly, "the Commission has discretion to examine a period that most reasonably allows it to determine whether a domestic industry is injured by LTFV imports." *Kenda Rubber Indus. Co., Ltd. v. United States*, 10 CIT 120, 126–27 , 630 F. Supp. 354, 359 (1986); *see Usinor, Beautor, Haironville, Sollac Atlantique, Sollac Lorraine v. United States*, 26 CIT ___ , ___ , 2002 Ct. Intl. Trade LEXIS 98 *32–*33 (stating that "in making a present material injury determination, the Commission must address record evidence of significant circumstances and events that occur between the petition date and vote date"). The Court recognizes that "older information on the record provides a historical backdrop against which to analyze fresher data."[2] *Usinor*, 26 CIT at ___ , 2002 Ct. Intl. Trade LEXIS 98 at *34. Here, the ITC properly exercised its discretion and followed its usual practice of collecting and analyzing data for a three year period. The Commission reasonably determined that using earlier volume data without obtaining price and market condition data would lead to an incomplete analysis. Accordingly, the Commission's volume determination is affirmed.

III. The Commission's Determination That There was Significant Underselling by Subject Imports

A. The Commission's Findings

The ITC found that the subject imports and the domestically produced silicon metal are generally substitutable. *See ITC Determination* at 11. The ITC also found, and the parties agreed, that "price is very important in purchasing decisions, given the commodity-like nature of the subject product." *Id.* at 11–12. The Commission con-

[2] The ITC has previously acknowledged that "the time period for which [it] collects data — three years in most cases — merely serves as a historical frame of reference for an analysis of the current condition of the domestic industry at the time of the Commission's determination." *12-Volt Motorcycle Batteries From Taiwan*, Inv. No. 731–TA–238 (Final), USITC Pub. 2213 at 11, (Aug. 1989).

cluded that silicon metal prices in the primary, secondary and chemical market segments key off the price for secondary aluminum. *See id.* at 12. The data collected showed that Russian silicon metal produced for the primary and secondary market segments undersold comparable domestic products. *See id.* The data also showed that subject imports were priced below the domestic product in thirteen out of fifteen quarterly pricing comparisons for primary aluminum grade silicon metal. *See id.* For secondary aluminum grade silicon metal, subject imports were priced below the domestic product in eleven out of fifteen quarters. *See id.* "Purchaser price data [also showed] underselling by Russian imports in all quarterly comparisons." *Id.* Subject imports undersold the domestic product in all eleven quarters for all three aluminum grades of silicon metal that were reviewed by the ITC. *See id.* In addition, purchase price data showed that Russian silicon metal undersold non-subject imports. *See id.* at 13. Subject imports had never been the lowest priced product in the United States market throughout the period of investigation. *See id.* The Commission found that the average unit value ("AUV") of imports from Russia were lower than the aggregate AUVs of non-subject imports. *See id.* Based on this pricing data, the ITC determined that the underselling by subject imports was significant during the period of investigation. *See id.*

Prices in all three silicon metal segments declined during the period of investigation for the United States product and the subject imports, but the ITC found significant price depression by the subject imports. *See id.* at 14. The Commission noted that non-subject import prices "have had an independent price depressive effect on domestic silicon metal prices." *Id.* at 15. The ITC, however, determined that "given the significant underselling by subject imports, subject import volume surges during the [period of investigation], and the high degree of substitutability between subject imports and domestic product . . . subject imports themselves have significantly depressed domestic silicon metal prices in all three customer segments. . . ." *Id.* Based on a comparison of purchaser data to the domestic product, the ITC found that the underselling margins for subject imports were the highest for chemical grade silicon, the market segment where most domestic product is sold. *See id.*

B. The Commission's Finding that Silicon Metal Prices Key Off the Secondary Aluminum Price

1. Contentions of the Parties

a. Plaintiffs' Contentions

Plaintiffs contend that the Commission's conclusion— that silicon metal prices in all three market segments key off published "spot" prices for secondary aluminum grade silicon metal— is not sup-

ported by substantial evidence. *See* Pls.' Br. at 20–25. Plaintiffs take issue with the ITC's explanation of the way in which prices in the market segments are set.

> The record in this investigation indicates that domestically produced silicon metal and subject imports are generally substitutable, and that price is a key factor in purchasing decisions. The parties agree that price is very important in purchasing decisions, given the commodity-like nature of the subject product. In addition, silicon metal prices in all three segments key off secondary aluminum price and exhibit similar trends.

ITC Determination at 11–12 (citations omitted). Plaintiffs specifically argue that the ITC improperly accepted petitioners assertion that "spot" prices for silicon metal in the secondary aluminum segment, published in the industry publication *Metals Week*, key off pricing for all segments of the market. *See id.* at 20. Plaintiffs assert that, "the ITC's subsequent analysis of the price effects of the imports from Russia was explicitly based on this 'finding,' " which lacked factual support. *Id.* at 21.

Plaintiffs maintain that the ITC was unable to cite any data from its staff report, any testimony from the hearing, or any admissions from respondents to support its finding. *See id.* Rather, the Commission found support for its conclusion in "a passage in petitioners' prehearing brief, which actually referred back to a ten-year-old ITC determination, and not to any evidence on the record of the current proceeding." *Id.* Plaintiffs argue that there is overwhelming record evidence which demonstrates that prices in the other market segments were not effected by the published "spot" prices for the secondary aluminum segment. *See id.* at 22. Plaintiffs assert that the testimony of the purchasing manager of General Electric, which explained how published "spot" prices for the secondary aluminum segment effect her contracts, shows that "spot" prices "had absolutely no effect on the pricing in contracts in the chemical market segment." *Id.* at 23. Additionally, the "metal markets index" had no bearing on the price of contracts in the chemical segment. *See id.* Plaintiffs maintain that price in the chemical market segment for General Electric was "set based on [an] analysis of the price her company could pay while remaining profitable. . . ." *Id.*

While the silicon metal products sold by United States producers are interchangeable with those imported from Russia and other countries, the high level of quartzite used by Russian producers makes it "generally impractical for the Russian producers to produce silicon metal meeting the low-iron requirements of the primary aluminum market segment." Reply Br. Pls.' Brastk & Rual Trade Ltd. & Pl.-Intervenor General Electric Supp. Pls.' R. 56.2 Mots. J. Agency R. at 4. United States producers, on the other hand, target their pro-

duction for the primary aluminum segment, yet most of their sales in the United States are in the chemical market segment. *See id.* at 4–5; Pls.' Br. at 9.

The ITC's questionnaire to silicon metal purchasers asked about the relationship of contract prices to "spot" prices. *See* Pls.' Br. at 23. Three of seven purchasers responded that there is no relationship between contract and "spot" prices. *See id.* at 24. Three other purchasers claimed that "spot" prices were a factor in determining contract prices, but that there may not be a direct relationship between the two prices. *See id.* The last purchaser stated that a price differential ranging from $0.05 and $0.10 between the two prices had been generally observed. *See id.* Based on these responses, Plaintiffs contend that "the ITC's erroneous analysis of the impact of the prices in the secondary aluminum segment was the entire foundation of its decision that the [United States] producers had been harmed in the chemical segment– which was the only segment where [petitioners] actually complained about imports from Russia." *Id.* at 25.

b. ITC's Contentions

The ITC asserts that there was ample evidence to support its finding, in its price effects analysis, that silicon metal prices in all three segments key off published "spot" prices for the secondary aluminum segment. *See* ITC's Br. at 22. Furthermore, the ITC asserts its determination must be reviewed by this Court as a whole, "even if it does not agree with the Commission on each and every subsidiary finding," and that the Court should affirm the ITC's determination if the record, as a whole, supports the determination. *Id.* The Commission points out that United States producers' price data indicated "similar pricing trends among the three segments. . . ." *Id.* The ITC maintains that record evidence showed that the "[s]pot prices published in *Metals Week* are used as a measure of prevailing market prices by buyers and sellers in all industry segments." *Id.* at 23. One domestic producer stated that its contracts had a pricing mechanism to periodically adjust prices based on prices published in *Metals Week* or *Ryan's Notes*. *See id.* Another domestic producer indicated that "its contract terms are generally fixed or indexed to prices published in *Metals Week* or *Ryan's Notes* depending on the customer and duration of [sic] contract." *Id.* The ITC asserts that Plaintiffs' depiction of its findings "belies their statement during the final investigation," that prices in the primary and secondary segments moved virtually in tandem. *See id.* at 24.

The ITC concedes that their was testimony on the record which contradicted its determination. The ITC, however, asserts that such testimony "does not render the Commission's determination as a whole unsupported by substantial evidence." *Id.* Rather, the ITC has discretion to reasonably interpret evidence and "to determine the overall significance of any particular factor or piece of evidence." *Id.*

Here, the Commission weighed all the evidence, including contradictory testimony, to reach its price effects determination. *See id.* at 24–25. The ITC maintains that it discussed "record evidence about the influence of spot prices on contracts in its conditions of competition section." *Id.* at 25.

c. Defendant-Intervenors' Contentions

Defendant-Intervenors assert that the ITC's price effects findings are reasonable and supported by substantial evidence. *See* Defendant-Intervenors' Br. at 20–24. Citing sales data for the secondary aluminum market, Defendant-Intervenors note that subject imports' prices in the secondary aluminum segment declined from the first quarter of 1999, to the fourth quarter of 2001 and continued to drop in the first quarter of 2002. *See id.* at 20–21 (citing proprietary information). Similarly, prices for subject imports in the primary aluminum market dropped from the first quarter in 1999 to the fourth quarter of 2001. *See id.* (citing proprietary information). Defendant-Intervenors also argue that the record supports the ITC's conclusion that subject imports depressed the prices of non-subject imports. *See id.* at 22. Defendant-Intervenors maintain that at the beginning of the period of investigation "the import AUV of non-subject imports was more than $200/[short tons] higher than the AUV of the Russian imports." *Id.* Defendant-Intervenors maintain that "[a]s the Russian imports surged into the [United States] market in 2001, the prices of non-subject imports were pulled down and this spread narrowed to $98/[short tons]." *Id.* Subject imports, however, fell to their lowest AUV during the period of investigation in the January to September 2002 period, and the price gap increased to $191/short tons. *See id.* Nonetheless, Defendant-Intervenors maintain that the import AUV data supports the ITC's determination that the subject imports depressed the prices of both the domestic product and non-subject imports. *See id.*

2. Analysis

The Commission has "broad discretion in analyzing and assessing the significance of the evidence on price undercutting." *Cooperweld Corp. v. United States*, 12 CIT 148, 161, 682 F. Supp. 552, 565 (1988). Under 19 U.S.C. § 1677(7)(C)(ii)(I), the ITC must determine if "there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States." The ITC must also consider whether the subject imports otherwise suppress, depress or prevent domestic price increases to a significant degree. *See* 19 U.S.C. § 1677(7)(C)(ii)(II). In the case at bar, the Commission found that silicon metal prices in all three market segments key off the secondary aluminum price. The ITC also found that subject imports depressed prices in the secondary aluminum market, which consequently affected prices in the

other two segments as well. The Court finds that the Commission's conclusion that prices in all three segments key off secondary aluminum prices is not supported by substantial evidence.

The ITC failed to explain why it rejected certain evidence indicating that "spot" prices did not effect contract prices. Three out of seven responses to the ITC's questionnaires indicate that "spot" prices are a factor in determining contract prices, but "there may not be a direct relationship between spot and contract prices." *See ITC Determination* at 9. During its investigation, the ITC found that silicon metal sales in the United States are made on both a contract and "spot" price basis. *See id.* at 8. While United States producers reported that 95 percent of their sales are made on a contract basis, importers and purchasers reported that their sales were mixed: "some firms reporting that all or the majority of sales are done on a spot basis and others reporting that all or the majority of sales are on a contract basis." *Id.* While United States producers indicated that most of their sales price terms were set within contracts, one producer indicated that its contracts "contain a pricing mechanism to adjust prices quarterly, semi-annually, or annually based on a published price like *Metals Week* or *Ryan's Notes*." *Id.* at 9. A different producer indicated that it had contracts with meet-or-release clauses. *See id.* Another producer indicated that its contract terms are either fixed or indexed to the prices contained in one of the two publications. *See id.* The Commission failed to reconcile contradicting evidence and provide a reasonable explanation as to why it chose the evidence used to support its findings.

The ITC gathered information from purchasers on whether prices were adjusted during the terms of contracts. *See id.* The data gathered indicates that "spot" prices did not key off secondary aluminum prices. When asked if prices vary within the duration of a contract in response to changes in "spot" prices, the majority of respondents indicated that prices did not vary. *See id.* In addition, five out of five respondents replied "in the negative when asked if any suppliers had actually changed prices during the period in which a contract with a meet-or-release clause was in place." *Id.* While the Commission found that three out of seven respondents indicated that "spot" prices are a factor in determining contract prices, these respondents also indicated that "there may not be a direct relationship between spot and contract prices." *Id.*

Furthermore, the Commission notes that United States producers' price data indicated "similar pricing trends among the three segments. . . ." ITC's Br. at 22. Silicon metal sold to chemical producers was, on average, $0.10 per pound more expensive than that sold to primary aluminum producers. *See id.* The price for silicon metal sold to primary aluminum producers was on average $0.05 more expensive than that sold to secondary aluminum producers. *See id.* The ITC determined that record evidence showed that the "[s]pot prices

published in *Metals Week* are used as a measure of prevailing market prices by buyers and sellers in all industry segments." *Id.* at 23. One domestic producer stated that its contracts had a pricing mechanism to periodically adjust prices based on prices published in *Metals Week* or *Ryan's Notes*. *See id.* Another domestic producer indicated that "its contract terms are generally fixed or indexed to prices published in *Metals Week* or *Ryan's Notes* depending on the customer and duration of [sic] contract." *Id.* The ITC asserts that Plaintiffs' depiction of the ITC's finding "belies their statement during the final investigation," that prices in the primary and secondary segments moved virtually in tandem. *See id.* at 24. While the Court recognizes the broad discretion Congress granted to the Commission in analyzing evidence presented to it, the ITC's determinations must be reasonable and supported by substantial evidence.

In the case at bar, the evidence before the ITC allows for the drawing of two inconsistent conclusions from the same evidence. The Commission, however, has not sufficiently explained its reasons for concluding that silicon metal prices in all three segments effect pricing in the secondary aluminum market. In addition, the Court finds that the Commission failed to explain the significance or effect of the similar pricing trends among the three market segments. While the Court may not substitute its judgment for that of the ITC, *see American Spring*, 8 CIT at 22, 590 F. Supp. at 1276, the ITC's determination must be reasonable and supported by substantial evidence. The record does not adequately explain the Commission's determination with respect to its price determination. Accordingly, the Court remands this issue to the ITC with instructions: (1) to explain its reasons for accepting evidence that "spot" prices may effect contract prices while rejecting contradictory evidence; (2) to explain the significance or effect of the similar pricing trends of the different market segments; and (3) if the Commission cannot provide sufficient reasons or explanations, to change its determination accordingly.

CONCLUSION

The Court finds that the ITC's determination with respect to volume was reasonable and supported by substantial evidence. The case is remanded to the Commission with instructions: (1) to explain its reasons for accepting evidence that "spot" prices may effect contract prices while rejecting contradictory evidence; (2) to explain the significance or effect of the similar pricing trends of the different market segments; and (3) if the Commission cannot provide sufficient reasons or explanations, to change its determination accordingly. The Court will consider the remaining issues raised by Plaintiffs upon review of the remand redetermination.

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